Case Comments

Return to the Twilight Zone—Federal Long-Arm Jurisdiction and Amenability to Federal Rule of Civil Procedure 4(f) Bulge Service of Process: *Sprow v. Hartford Insurance Co.*

I. INTRODUCTION

The issue whether, in a federal court action in which subject-matter jurisdiction is grounded on diversity of citizenship,[1] a nonresident defendant's amenability to service of federal process is governed by a standard based upon state or federal law has been aptly described as existing somewhere in the "twilight zone" between substance and procedure.[2] As a result, it is arguable whether the *Erie-York* doctrine,[3] which prescribes the rules governing application of state law by federal diversity courts,[4] provides a simple answer. Moreover, irrespective of the *Erie-York* problems presented by the twilight zone issue, there is a split of authority among the federal courts on the appropriate due process constraints that apply to a federal court's exercise of in personam jurisdiction.[5]

Neither Congress nor the Supreme Court has directly addressed the twilight zone issue,[6] and the lower federal courts have come down on both sides of the question, some holding that a federal standard of amenability

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1. *See* 28 U.S.C. § 1332 (1976). The twilight zone issue is framed in terms of diversity of citizenship for the purposes of analysis of the *Erie-York* aspects of the problem. *See* text accompanying notes 279-317 *infra*.

2. Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 518 (2d Cir. 1960) (Friendly, J. concurring); Sampson v. Channell, 110 F.2d 754, 756-57 (1st Cir. 1940); Note, 74 HARV. L. REV. 1662, 1665 (1961). In Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941), the Supreme Court defined "procedure" as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." By this definition, substantive law is presumably comprised of those rights and duties which give rise to a remedy. The indistinct nature of these definitions illustrates the difficulty inherent in attempting to draw a sharp line between substance and procedure.

3. Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *See* text accompanying notes 141-55 *infra*.

4. The *Erie-York* doctrine holds that a federal diversity court must apply state substantive law and state procedure when such procedure is outcome-determinative and bound up with state-created rights and obligations. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-38 (1958); Guaranty Trust Co. v. York, 326 U.S. at 108-09; Erie R.R. v. Tompkins, 304 U.S. at 78; Szantay v. Beech Aircraft Corp., 349 F.2d 60, 63-64 (4th Cir. 1965); H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICTS OF LAWS § 15, at 25-31 (4th ed. 1964). *See* text accompanying notes 141-55 *infra*.

5. *Compare* Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), *with* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960). *See also* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1924); Iovino v. Waterson, 274 F.2d 40, 45 (4th Cir. 1960).

6. The 1966 amendments to the Federal Rules of Civil Procedure, adopted after the federal standard-state standard controversy had developed, failed even to address the issue.

to service of process is to apply,[7] while others have required a test of amenability based upon state jurisdictional law and policy.[8] When the issue has concerned the amenability to service of an original party defendant to a diversity action,[9] the majority of federal courts of appeals have reached a consensus, relying at least in part on the *Erie-York* doctrine, that state law controls.[10]

Recent years have seen a similar twilight zone issue arise in the context of amenability to bulge service of process issued pursuant to Federal Rule of Civil Procedure 4(f).[11] Again, most federal courts that have addressed the question have held that such amenability is to be tested by state law,[12] although the bases of these decisions are often unclear and many have been criticized.[13] Contrary to this weight of authority, in the recent case of *Sprow v. Hartford Insurance Co.*,[14] the Fifth Circuit Court of Appeals

7. Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960), *overruled*, Arrowsmith v. United Press Int'l, 320 F.2d at 225; Berlanti Constr. Co. v. Republic of Cuba, 190 F. Supp. 126 (S.D.N.Y. 1960); Kennedy v. Long Island R.R., 26 F.R.D. 589 (S.D.N.Y. 1960). *See also*, Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 198-203 (E.D. Pa. 1974); Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 356-57 (W.D. Mich. 1973); Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-91 (S.D. Ohio 1967); First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736-37 (E.D. Tenn. 1962); Comment, *Federal Jurisdiction over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685 (1964); Note, *Diversity Jurisdiction of the Federal Courts over Foreign Corporations*, 49 IOWA L. REV. 1224 (1964); Note, *Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards?*, 48 MINN. L. REV. 1131 (1964); Comment, *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752 (1964).

8. *See, e.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963). *See also* cases cited in note 10 *infra*.

9. "Original party defendant" as used in this Comment refers to a party who the federal court can reach through the normal avenues of service of process prescribed by Federal Rule of Civil Procedure 4(a)-(e), without necessity of resort to rule 4(f) bulge service of process.

10. Intermeat, Inc. v. American Poultry Inc., 575 F.2d 1017 (2d Cir. 1978); Wilkerson v. Fortuna Corp., 554 F.2d 745 (5th Cir. 1977), *cert. denied*, 434 U.S. 939 (1977); Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Mgt., Inc., 519 F.2d 634 (8th Cir. 1975); Quarles v. Fuqua Indus., Inc., 504 F.2d 1358 (10th Cir. 1974); Pujol v. U.S. Life Ins. Co., 396 F.2d 430 (1st Cir. 1968); Edwards v. St. Louis-S.F.R.R., 361 F.2d 946 (7th Cir. 1966); Aftanse v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965); Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of N. Cal. Inc., 342 F.2d 393 (9th Cir. 1965); Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963); Walker v. General Features Corp., 319 F.2d 583 (10th Cir. 1963); Partin v. Michaels Art Bronze Co., 202 F.2d 541 (3d Cir. 1953). *See*, Kenny v. Alaska Airlines, Inc., 132 F. Supp. 838 (S.D. Cal. 1955); 2 MOORE'S FEDERAL PRACTICE § 4.25 (7) (1979) [hereinafter cited as MOORE]; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 64, at 304 (3d ed. 1976) [hereinafter cited as C. WRIGHT]; 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1075, at 309-12 (1969) [hereinafter cited as WRIGHT & MILLER]; Comment, 43 B.U.L. REV. 409 (1963); Note, *The Applicability of State or Federal Law to Determine Whether In Personam Jurisdiction Exists over Non-Residents:* Arrowsmith v. United Press Int'l, 49 CORNELL L.Q. 320 (1964); Note, 77 HARV. L. REV. 559 (1964); Note, *Second Circuit Holds State Standard Determines Amenability of Foreign Corporation to Service of Process in Diversity Action*, 25 OHIO ST. L.J. 119 (1964); Note, *In Personam Jurisdiction of the Federal Courts over Foreign Corporations in Diversity Cases: State versus Federal Law under* Erie R.R. v. Tompkins, 38 ST. JOHN'S L. REV. 327 (1964); Comment, *Federal Courts—Diversity Jurisdiction of Foreign Corporation*, 66 W. VA. L. REV. 137 (1963).

11. FED. R. CIV. P. 4(f). *See* text accompanying note 19 *infra*.

12. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968); Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. 630 (E.D. La. 1976); Spearing v. Manhattan Oil Trans. Co., 375 F. Supp. 764 (S.D.N.Y 1974); Pierce v. Globemaster Baltimore, Inc., 49 F.R.D. 63 (D. Md. 1969); McGonigle v. Penn-Central Trans. Co., 49 F.R.D. 58 (D. Md. 1969); Karlsen v. Hanff, 278 F. Supp. 864 (S.D.N.Y. 1967).

13. 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 314-15, § 1127, at 534-35.

14. 594 F.2d 412 (5th Cir. 1979).

adopted a constitutionally based standard of amenability to federal rule 4(f) bulge service of process. *Sprow* held that due process is satisfied to the party served with bulge process if there is a sufficient nexus between such party and either the state in which the federal court sits *or* the bulge area created by the 100-mile jurisdictional limit imposed on bulge process by rule 4(f).[15] Under the *Sprow* test, the sufficiency of this nexus between the party served and the expanded federal forum created by rule 4(f) is determined solely in light of the constitutional restraints of the minimum contacts doctrine of *International Shoe Co. v. Washington*,[16] without reference to state jurisdictional law.[17] Although subject-matter jurisdiction in *Sprow* was based on diversity of citizenship, the court did not address the underlying *Erie-York* problems presented by application of a standard of amenability based on federal rather than state law. Moreover, by grounding its test upon the minimum contacts doctrine of *International Shoe*, a doctrine based upon the due process requirements of the fourteenth amendment, the *Sprow* court failed to recognize that the constraints of the fourteenth amendment, including *International Shoe*, apply only to the states, and that the appropriate due process limitations on a federal court's exercise of personal jurisdiction through bulge service of process are those found in the fifth amendment to the Constitution.[18]

This Case Comment will examine the standard of amenability to service of federal process issue in the context of Federal Rule of Civil Procedure 4(f) and in light of the *Sprow* holding and rationale by addressing two major aspects of the twilight zone issue: first, whether considerations of constitutional due process or the Federal Rules of Civil Procedure require that amenability to bulge service of federal process be determined in accordance with state law; and second, whether the *Erie-York* doctrine mandates such a result. Specifically, it will be asserted that a constitutional standard, as in *Sprow*, is a more reasoned, practical, and appropriate test for determining amenability to bulge process than the various state law standards applied by earlier cases. After examining the bulge service of process provision, the policies supporting it, the facts and holding of *Sprow*, the general background of the federal standard versus state standard controversy and the effect of this controversy on the issue of amenability to rule 4(f) bulge process, this Case Comment will also show that the *Sprow* standard is more desirable than those previously applied—even in light of the *Erie-York* doctrine—since the *Sprow* test more effectively affords realization of the underlying policy considerations and purposes of federal rule 4(f) bulge service of process. Insofar as *Sprow* is based upon fourteenth amendment due process requirements, however, this Case Comment must disagree with the *Sprow* analysis and rationale.

15. *Id.* at 416.

16. 326 U.S. 310 (1945). *See* text accompanying notes 89-97 *infra*.

17. Sprow v. Hartford Ins. Co., 594 F.2d at 415-16.

18. C. WRIGHT, *supra* note 10, § 64, at 303. *See also* Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-91 (S.D. Ohio 1967).

Rather, this Case Comment will show that when rule 4(f) bulge service of federal process is employed, the limitations on a federal court's jurisdiction over the person should arise solely from the due process constraints of the fifth amendment and any limits imposed by Congress in its grant of extraterritorial jurisdictional authority.

II. THE BULGE SERVICE OF PROCESS PROVISION IN FEDERAL RULE OF CIVIL PROCEDURE 4(f): AN OVERVIEW

The bulge service of process provision in Federal Rule of Civil Procedure 4(f) provides:

> [P]ersons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or crossclaim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this Rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial.[19]

The effect of this extraterritorial service provision is to expand the geographic reach of federal district court process to all places within 100 miles of the federal courthouse, regardless of whether the place where service is made is within the territorial boundaries of the state in which the federal court sits.[20] The bulge process provision has effect, however, only in the limited instances when the party sought to be served is a third-party defendant under federal rule 14,[21] or a person required for just adjudication under federal rule 19.[22] Bulge service of process has no application to original party defendants to an action, unless such persons classify as necessary or indispensable parties under rule 19.[23]

As can be seen by a reading of the bulge process provision, rule 4(f) does not expressly state that amenability to bulge service is to be determined solely by reference to federal jurisdictional principles, although such a construction is clearly plausible from both the language of

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19. FED. R. CIV. P. 4(f). The bulge service of process provision is part of the 1963 amendments to the Federal Rules of Civil Procedure. *See Amendments to Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 587 (1963). For a discussion of the initial reaction to the amendment, *see* Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601 (1964); Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U.L. REV. 1053 (1963); Note, *Federal Jurisdiction and Practice: Proposed Amendments for Federal Rules of Civil Procedure*, 16 OKLA. L. REV. 352 (1963). *But see* Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for United States District Courts*, 18 F.R.D. 105, 106-7 (1956).

20. FED. R. CIV. P. 4(f). Bulge service of process is an authorized extension of federal process beyond the general state limits imposed by the initial provision of rule 4(f). *See generally* Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 442 (1946).

21. FED. R. CIV. P. 14. *See, e.g.*, Lee v. Ohio Cas. Ins. Co., 445 F. Supp. 189 (D. Del. 1978) (rule 4(f) bulge process used to bring in a rule 14 third-party defendant).

22. FED. R. CIV. P. 19. *See, e.g.*, Delaware v. Bender, 370 F. Supp. 1193 (D. Del. 1974)(rule 4(f) bulge process used to bring in a rule 19 indispensable party).

23. Rule 4(f) bulge process has no application when the party sought to be served is not a rule 14 or rule 19 party. White v. Diamond, 390 F. Supp. 867 (D. Md. 1974). Note, however, that bulge process may also be used to bring in a person required to answer a commitment order for civil contempt. FED. R. CIV. P. 4(f).

the rule itself and the intent of its drafters.[24] Courts that have held that a state law standard of amenability is to apply,[25] however, have done so on the assumption that rule 4(f) relates only to the manner and scope of federal service of process and does not provide an independent basis for a federal court's assertion of in personam jurisdiction.[26] Therefore, according to the reasoning of these courts, reference must be made to the appropriate state law to determine whether that law allows the court to exercise jurisdiction over the party served with bulge process.[27] These state law standard courts have, however, reached varying conclusions on the question of what is the appropriate state law, some holding that reference is to be made to the law of the state in which the federal court sits (*i.e.* the forum state),[28] while others require that amenability be determined in accordance with the law of the state in which bulge service of process is effected (*i.e.* the state of service).[29] By contrast, *Sprow v. Hartford Insurance Co.* developed its federal law test of amenability to bulge service of process on the reasoning that the bulge provision of federal rule 4(f) itself affords a distinct basis for a federal court's assertion of personal jurisdiction.[30]

III. THE POLICY BASES OF FEDERAL RULE OF CIVIL PROCEDURE 4(f) BULGE SERVICE OF PROCESS

The Notes of the Advisory Committee on the bulge service of process provision in federal rule 4(f) state that

> [t]he bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In light of present-day facilities for communication and travel, the territorial range of the service allowed . . . can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one state. . . . The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification.[31]

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24. *See* text accompanying notes 31-48 *infra.*

25. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968); Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. 630 (E.D. La. 1976); Spearing v. Manhattan Oil Trans. Co., 375 F. Supp. 764 (S.D.N.Y. 1974); Pierce v. Globemaster Baltimore, Inc., 49 F.R.D. 63 (D. Md. 1969); McGonigle v. Penn-Central Trans. Co., 49 F.R.D. 58 (D. Md. 1969); Karlsen v. Hanff, 278 F. Supp. 865 (S.D.N.Y. 1967). *See also* School District of Kansas City v. Missouri, 460 F. Supp. 421, 435-36 (W.D. Mo. 1978); R. Clinton Const. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838, 849 n.9 (N.D. Miss. 1977).

26. *See* cases cited in note 25 *supra. See also* Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, Purchase Directorate, 360 F.2d 103 (2d Cir. 1966), *cert. denied,* 385 U.S. 931 (1966); Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

27. *See, e.g.,* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 252; Karlsen v. Hanff, 278 F. Supp. at 865.

28. 278 F. Supp. at 865.

29. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 252; Spearing v. Manhattan Oil Trans. Co., 375 F. Supp. at 771.

30. Sprow v. Hartford Ins. Co., 594 F.2d at 416.

31. Judicial Conference of the United States, *Report of Proposed Amendments to Certain Rules of Civil Procedure for the United States District Courts,* 31 F.R.D. 621, 629 (1963) [hereinafter cited as *Advisory Committee's Notes*].

From these notes, and from the wording of the bulge provision itself,[32] it is clear that rule 4(f) bulge service of process is intended to encourage solution in one judicial proceeding of the many issues that may arise in complex multiparty, multistate litigation.[33] Presumably, this policy is meant not only to foster convenience to the parties and the courts, but also, in the limited situations in which bulge service applies, to provide a forum for cases in which jurisdiction over all interested or necessary parties cannot otherwise be obtained through use of state long-arm authority,[34] or which the parallel state courts do not handle and perhaps cannot handle because of constitutional limitations. In order to attain these goals, bulge process reflects a balance struck between the federal interest in resolution of complicated litigation in one proceeding and the individual's interest in defending himself in a convenient forum, with the balance weighing in favor of "the benefits that may be obtained from the disposition by a federal court of an entire controversy."[35]

This is not to suggest that the mandates of due process and fundamental fairness to nonresident litigants are not to be afforded their full effect; rather, it illustrates one of the major thrusts behind the federal rules in general, and rule 4(f) in particular—that modern federal procedure is a balance between the traditional restraints of jurisdictional principles and the need for efficient and economical adjudication of complex controversies.[36]

The policy encouraging resolution of entire controversies is not limited to the bulge service of process provision of rule 4(f). It appears time and again throughout the federal rules. Particularly relevant in this regard are the federal rules relating to counterclaims and cross-claims,[37] third-party practice,[38] joinder of claims and remedies,[39] joinder of persons needed for just adjudication,[40] permissive joinder of parties,[41] misjoinder and non-joinder of parties,[42] and interpleader.[43] Each of these rules is structured to maximize joinder of either claims or parties in order to secure complete adjudication of the controversy before the court.[44] Indeed, the scope provision of the federal rules demands that they "be construed to

32. *See* text accompanying note 19 *supra.*

33. 4 WRIGHT & MILLER, *supra* note 10, § 1127, at 532.

34. Kaplan, *supra* note 19, at 632.

35. McGonigle v. Penn-Central Trans. Co., 49 F.R.D. at 62.

36. *See generally* Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966), *rehearing denied*, 384 U.S. 915 (1966); Foman v. Davis, 371 U.S. 178 (1962); Hartley & Parker, Inc. v. Florida Beverage Corp., 348 F.2d 161 (5th Cir. 1965).

37. FED. R. CIV. P. 13.

38. FED. R. CIV. P. 14.

39. FED. R. CIV. P. 18.

40. FED. R. CIV. P. 19.

41. FED. R. CIV. P. 20.

42. FED. R. CIV. P. 21.

43. FED. R. CIV. P. 22.

44. *See generally* M. GREEN, BASIC CIVIL PROCEDURE 60, 66 (1972).

secure the just, speedy, and inexpensive determination of every action."[45] The resolution of entire controversies in one proceeding clearly fosters that result.

A similar philosophy favoring solution of entire cases in one court action can be seen in the federal statutes allowing nationwide service of federal process, particularly the Federal Interpleader Act,[46] which provides for nationwide process in a context that has traditionally been considered the realm of diversity jurisdiction and which serves as precedent for the rule 4(f) bulge provision.[47] Thus, it can be seen that the policy of determination of entire controversies not only forms the backbone of bulge service of process, but is also a major federal consideration that must be given effect to the maximum extent practicable whenever conflicting interpretations of the Federal Rules of Civil Procedure are at issue.[48]

IV. THE FACTS AND HOLDING OF *Sprow v. Hartford Insurance Co.*

Plaintiffs, residents of Louisiana, brought an action based upon diversity of citizenship in the federal district court for the Eastern District of Louisiana, located in New Orleans, on a claim for relief arising from a motor vehicle accident near Port Sulphur, Louisiana.[49] Defendant, Hartford Insurance Co. (Hartford), was the insurer of L. D. Gollott, who, in conjunction with his brother, E. M. Gollott, operated a seafood business in Biloxi, Mississippi.[50] E. M. Gollott was the registered owner of the other vehicle involved in the accident out of which this litigation arose.[51] According to an alleged agreement between the Gollott brothers, this vehicle was to be insured by L. D. Gollott.[52] At the time of the accident, however, L. D. Gollott's insurance policy with Hartford did not cover the Gollott vehicle.[53]

Prior to the accident, L. D. Gollott had allegedly instructed Arnold Breseman, an agent and partner of Frazier Insurance Co. (Frazier) and representative of Hartford, to add E. M. Gollott's vehicle to L. D. Gollott's existing policy with Hartford.[54] On the grounds that Breseman and Frazier were negligent in failing to provide the additional insurance coverage

45. FED. R. CIV. P. 1. *See generally* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946). *But see* Harris v. Nelson, 394 U.S. 286 (1969), *rehearing denied*, 394 U.S. 1025 (1969).

46. 28 U.S.C. § 1335.

47. Vestal, *supra* note 19, at 1059 n.38.

48. *See generally* Gutor International AG v. Raymond Packer Co., Inc., 493 F.2d 938, 946 (1st Cir. 1974); Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973).

49. Sprow v. Hartford Ins. Co., 594 F.2d 412, 414 (5th Cir. 1979).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

allegedly requested by L. D. Gollott, defendant Hartford impleaded Breseman and Frazier as third-party defendants pursuant to Federal Rule of Civil Procedure 14(a).[55] Breseman and Frazier were served with process at Frazier's principal place of business in Pascagoula, Mississippi.[56] The district court granted Breseman's and Frazier's motions for summary judgment on the ground that the third-party defendants did not have sufficient contacts with Louisiana to allow the court to assert personal jurisdiction on the basis of the Louisiana long-arm statute.[57]

Third-party plaintiff Hartford argued that, regardless of the third-party defendants' failure to satisfy the triggering elements of the state long-arm statute, personal jurisdiction over Breseman and Frazier could be obtained through the bulge service of process provision in Federal Rule of Civil Procedure 4(f).[58] In response, and relying on prior decisions that had held that rule 4(f) relates only to the manner and scope of service of federal process and not to amenability to suit,[59] the third-party defendants asserted that process can issue pursuant to the bulge provision of rule 4(f) only if the nonresident defendant otherwise has sufficient contacts with the state in which the federal court is held to justify in personam jurisdiction under the state long-arm statute.[60] The district court, however, did not decide whether personal jurisdiction over the third-party defendants could be obtained through the bulge service of process provision in rule 4(f).[61]

On appeal by Hartford, the Fifth Circuit noted that Frazier was a partnership licensed to do business solely in Mississippi, doing no business in nor deriving any benefits from Louisiana, and whose only connection with Louisiana was periodic communications with the Hartford office in New Orleans.[62] The court of appeals agreed with the district court that, on these facts alone, Breseman and Frazier did not have a sufficient nexus with Louisiana to allow personal jurisdiction to be asserted under the Louisiana long-arm statute.[63] The Fifth Circuit then reached the issue of rule 4(f) bulge service of process, holding that the third-party defendants Breseman and Frazier could be amenable to suit in the federal district court in Louisiana on that basis.[64]

By stating that "Rule 4(f) offers a distinct basis for [a federal] court's jurisdiction,"[65] the Fifth Circuit expressly rejected the position of the third-party defendants and other federal courts that the bulge provision speaks

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 415.
59. *See* cases cited in notes 25-26 *supra.*
60. 594 F.2d at 416.
61. *Id.* at 415-16.
62. *Id.* at 415.
63. *Id.*
64. *Id.* at 416.
65. *Id.*

to the manner and scope of service of federal process but not to when a party served is subject to the jurisdiction of the court.[66] The court went on to enunciate its standard of amenability to suit under the bulge service of process provision, holding that, in accordance with "the basic constitutional principles in [the] area [of personal jurisdiction], . . . the appropriate due process rule which governs Rule 4(f) is whether the party served had minimum contacts with the forum state *or* the bulge area so that it is fair and substantially just for the forum to impose judgment upon the party."[67] Although the court did not expressly state that it was formulating a standard grounded *solely* on federal law, rather than state law, this result is readily apparent from: (1) the court's rejection of the rationale of earlier cases holding that state jurisdictional principles must be satisfied before rule 4(f) bulge process can issue;[68] (2) the court's statement that its standard of amenability follows the "basic constitutional principles" governing the assertion of personal jurisdiction;[69] (3) the fact that the only limitations the court placed upon application of the 100-mile bulge provision were the constraints of the due process clause;[70] and (4) the opinion's total lack of reference to state jurisdictional law.[71]

In finding support for its adoption of a constitutional standard of amenability, the Fifth Circuit noted that since rule 4(f) bulge service of process is an expansion of federal district court jurisdiction beyond the general state geographic boundary limits imposed by the federal rule relating to the territorial limits of effective service of process,[72] "the logical test for due process purposes is the connection between the nonresident and the geographical area included within that [expanded] jurisdiction."[73]

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66. *Id. See* cases cited in notes 25-26 *supra.*

67. 594 F.2d at 416. In this regard, the court relied on Professor Kaplan's analysis of the jurisdictional impact of federal rule 4(f) bulge service of process:

> [I]t seems a roughly accurate formula of decision to hold that the party should be amenable to the federal process if, considering its activities within the forum state plus the 100 mile area, it would be amenable to that state's process, had the state embraced this area and exerted judicial jurisdiction over the party to the degree constitutionally allowable.

Kaplan, *supra* note 19, at 633. Note, however, that this formula appears to incorporate the fourteenth amendment due process considerations of the *International Shoe* minimum contacts doctrine into a test of a federal court's in personam power. Generally, fourteenth amendment due process is not applicable to the federal courts. *See* text accompanying notes 82-140 *infra.*

68. 594 F.2d at 416. *See also* cases cited in notes 25-26 *supra.*

69. 594 F.2d at 416. *But see* text accompanying notes 82-140 *infra.*

70. 594 F.2d at 416. The court, after stating that rule 4(f) bulge service of process is limited to some extent by considerations of due process, noted that

> it is possible that a set of facts may arise where it would be fundamentally unfair to subject a party served within the bulge area to the forum's jurisdiction. The clearest example . . . is that of a corporation whose only contact with the forum state or bulge area is its officer's temporary presence within the bulge at the time of service.

Presumably, this statement reflects the court's concern with indications in Shaffer v. Heitner, 433 U.S. 186, 207-12 (1977) relating to the continued validity of transient in personam jurisdiction. *See also* text accompanying notes 128-140 *infra.*

71. *Compare* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 252 (2d Cir. 1968). *See* text accompanying notes 229-65 *infra.*

72. *See* FED. R. CIV. P. 4(f). *See also* text accompanying notes 119-25 *infra.*

73. 594 F.2d at 416.

This statement reflects the court's unarticulated premise that, regardless of the *Erie-York* doctrine, state jurisdictional law should have no effect on a federal court's power to reach a nonresident defendant when the court is exercising extraterritorial authority, based solely on federal law, pursuant to a valid extension of the court's jurisdictional base. The court's reasoning appears to be that since the expanded jurisdictional area created by the bulge provision exists solely because of federal authority and has no counterpart in traditional concepts of jurisdiction as defined by state territorial boundaries, the only logical course in testing a federal court's power over the person of a nonresident found within this expanded jurisdiction is to follow federal, not state, law.

The court found further justification for its position in the policy of rule 4(f) to allow a federal district court to resolve entire controversies in one proceeding.[74] The court stated that a standard of amenability based on the law of the forum state, as advocated by the third-party defendants Breseman and Frazier in their attempt to avoid the jurisdictional reach of the district court, "would eviscerate Rule 4(f), reducing it to merely a secondary means of serving persons already subject to the forum state's jurisdiction through its long-arm statute,"[75] and that such a result was clearly not the intent of rule 4(f)'s drafters.[76] Moreover, the court indicated that any standard of amenability to bulge process other than one based solely on federal constitutional principles would also be an unreasonable restraint on effectuation of the policy behind rule 4(f) to enable determination of entire controversies.[77]

In concluding its discussion of the rule it had adopted, the court summarized its position by stating that "a due process requirement of a meaningful nexus with the bulge area *or* forum state strikes a reasonable balance between the legislative interest [in determining entire controversies in one proceeding] and the interest of the nonresident in fundamental fairness."[78] This is a recognition by the court that any standard of personal jurisdiction that runs to the constitutional limits is essentially a balancing of the interests of the court and the plaintiff (in this instance, the third-party plaintiff) in efficiently resolving the dispute in an available and convenient forum, against the quality of the relationship between the party sought and the forum, in light of the jurisdictional reach of the court.[79] Since the *Sprow* standard includes both of these essential elements, it

74. *Id.* at 417. *See also Advisory Committee's Notes, supra* note 31, at 629.

75. 594 F.2d at 417.

76. *Id.*

77. *Id.* The court noted that its "development of a governing constitutional rule must take into account this significant procedural policy. Otherwise, the application of Rule 4(f) will be unreasonably constructed [*sic*] and the objective of efficient adjudication of extraterritorial disputes will be thwarted."

78. *Id.*

79. Kulko v. Superior Ct., 436 U.S. 84, 92 (1978).

appears to be well within the limits of the due process clause.[80] As a result, *Sprow* can rationally be challenged only as inappropriate in that it runs contrary to the *Erie-York* doctrine, which some courts appear to consider controlling on the issue of amenability to suit in a federal court.[81] This Case Comment will show, however, that the *Erie-York* doctrine presents no such obstacle to a standard of amenability to bulge service of process based solely on federal law.

The net effect of the *Sprow* constitutional standard of amenability is that the power of a federal district court to reach a nonresident with bulge process is conditioned only on the nonresident being within the class of parties able to be brought into an action by bulge service of process, and on the nonresident having a sufficient nexus with the expanded bulge jurisdiction of the court. Under *Sprow*, the sufficiency of this nexus is determined solely by reference to the due process requirements of the *International Shoe* minimum contacts doctrine, without regard to the law of the state in which the federal court is held or the law of the state in which bulge process is served.

V. THE PARAMETERS OF THE TWILIGHT ZONE

A. *Introduction: The Scope of the Issues*

The twilight zone is that nebulous gray area between substance and procedure essentially comprised of the issue whether a nonresident defendant's amenability to suit in a federal court is determined by reference to federal or state law. Although the issue originally arose in the context of the amenability to suit of an original party defendant to a diversity action, the question addressed by this Case Comment is somewhat more narrow—namely, whether amenability to Federal Rule of Civil Procedure 4(f) bulge service of process is governed by a test based upon federal law or state law. Inherent in this question are two major issues: first, the nature and scope of the constitutional due process limitations placed upon a federal court's assertion of personal jurisdiction over a party sought to be served with bulge process; and second, whether the *Erie-York* doctrine requires that a state law test of amenability be applied.

B. *The Constraints of Due Process of Law*

Amenability to service of process is a necessary prerequisite to a forum obtaining jurisdiction over the person of a defendant.[82] The reach of

80. Which due process clause is another question, however. *See* text accompanying notes 82-140 *infra*.

81. The court in *Sprow* did not address the issue of whether the *Erie-York* doctrine mandates application of a state law standard of amenability to rule 4(f) bulge service of process, although the issue had been dealt with by prior cases raising the same or similar issues, *see, e.g.*, Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968); Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963); Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960); and by legal commentary relied on by the *Sprow* court, *see* Kaplan, *supra* note 19, at 631-34.

82. C. WRIGHT, *supra* note 10, § 64, at 301-02.

a forum's in personam power is, in turn, governed by the constraints of due process of law.[83] The limitations of due process on a federal court's exercise of personal jurisdiction is perhaps the most confusing issue in the realm of federal jurisdiction.[84] Although it is clear that a federal court's power to reach a defendant is limited to some extent by considerations of due process,[85] the federal courts have not agreed on the source or substance of the due process constraints.[86] The most famous line of cases dealing with judicial authority to assert personal jurisdiction is that represented by the *International Shoe* minimum contacts doctrine,[87] and many of the federal courts that have considered these due process questions have held that the constraints of *International Shoe* are binding on the federal courts.[88]

Under the *International Shoe* minimum contacts doctrine,[89] a forum's ability to assert personal jurisdiction over a nonresident defendant is conditioned on the existence of a sufficient relationship between the nonresident and the forum.[90] The sufficiency of this nexus is determined by reference to the nature and quality of the nonresident's contacts with the forum "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[91] Contacts sufficient to justify assertion of jurisdiction over the person of a nonresident may range from isolated commercial transactions or tortious activity to a systematic and continuous relationship with the forum.[92] The ultimate test of the legitimacy of a forum's assertion of jurisdiction is whether such an

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83. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

84. *See generally* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 198-203 (E.D. Pa. 1974); First Flight Corp. v. National Carloading Corp., 209 F. Supp. 730, 736-37 (E.D. Tenn. 1962).

85. *See generally* Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."). *See also* Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961) [hereinafter cited as Green].

86. *Compare* Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (W.D. Mich. 1973), *with* Scott v. Middle East Airlines Co., S.A., 240 F. Supp. 1 (S.D.N.Y. 1965).

87. *See* text accompanying notes 89-97 *infra*.

88. *See, e.g.*, Sprow v. Hartford Ins. Co., 594 F.2d 412 (5th Cir. 1979); Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968); Karlsen v. Hanff, 278 F. Supp. 865 (S.D.N.Y. 1967); Scott v. Middle East Airlines Co., S.A., 240 F. Supp. 1 (S.D.N.Y. 1965); Paragon Oil Co. v. Panama Ref. & Petrochem. Co., 192 F. Supp. 259 (S.D.N.Y. 1961); C. WRIGHT, *supra* note 10, § 64, at 303 n.42; Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 534 (1963).

89. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). *See also* World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 580 (1980); Rush v. Savchuk, 100 S. Ct. 571 (1980); Kulko v. Superior Ct., 436 U.S. 84 (1979); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); May v. Anderson, 345 U.S. 528 (1953); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); Milliken v. Meyer, 311 U.S. 457 (1940). *See generally* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569 (1958).

90. International Shoe Co. v. State of Washington, 326 U.S. at 316.

91. *Id.* at 319.

92. *Compare* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), *with* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

exercise of judicial authority is consistent with "traditional notions of fair play and substantial justice."[93] Although the minimum contacts test is not one which can be mechanically or quantitatively applied,[94] it is clear that the nonresident defendant must engage in some purposeful act, of more substance than mere accidental or unintentional presence within the forum, which affords him some benefit or privilege of the forum.[95] Moreover, at least when the nature of the nonresident's contacts with the forum are singular or relatively isolated, the claim for relief that is at the basis of the forum's exercise of jurisdictional authority must arise from the contacts of the nonresident with the forum.[96] Any state standard of amenability to suit must be within these due process constraints of the minimum contacts doctrine. The courts have made it abundantly clear that a state's assertion of personal jurisdiction beyond the limits imposed by the minimum contacts doctrine contravenes the due process guarantees of the fourteenth amendment.[97] The net result of the minimum contacts doctrine is that a state can reach a nonresident defendant only if such person has a sufficient meaningful nexus with the territory of that state.

Although the minimum contacts doctrine of *International Shoe* may impose constraints on the federal courts in certain situations,[98] this limitation on a federal court's power of personal jurisdiction is not dictated by the Constitution.[99] *International Shoe* and its line of cases defined the ability of *state* courts to reach nonresident defendants.[100] The minimum contacts doctrine is an extension of the fourteenth amendment and, as such, is applicable *only* to the states.[101] The due process considerations controlling on the federal courts are those found in the fifth amendment,[102] and these fifth amendment constraints are not necessarily identical to those of the *International Shoe* minimum contacts doctrine, although the minimum contacts concept may be adopted under the fifth amendment by analogy.[103]

The fundamental distinction between fifth amendment jurisdictional

93. International Shoe Co. v. State of Washington, 326 U.S. at 316.

94. *Id.* at 319.

95. Hanson v. Denckla, 357 U.S. at 251-53. *But see* Atkinson v. Superior Ct., 49 Cal. 2d 338, 342-48, 316 P.2d 960, 963-69 (1957).

96. Singer, PPA v. Piaggio & Co., 420 F.2d 679 (1st Cir. 1970). *See generally* World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 580 (1980).

97. *See* cases cited in note 89 *supra*. *See also* World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. at 564-66; Pennoyer v. Neff, 95 U.S. at 720, 732-33.

98. *See* text accompanying notes 119-27 *infra*.

99. Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-91 (S.D. Ohio 1967).

100. *Id.*

101. *Id.*

102. *Id. See also* Holt v. Klosters Rederi A/S, 355 F. Supp. at 356-57.

103. Holt v. Klosters Rederi A/S, 355 F. Supp. at 356-57; Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390; Green, *supra* note 85, at 970, 986. *See also* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. at 199; First Flight Co. v. National Carloading Corp., 209 F. Supp. at 736-37; Comment, 7 RUT.-CAM. L.J. 158, 161 (1975).

due process, controlling on the federal courts, and fourteenth amendment jurisdictional due process, controlling on the state courts, arises from the most basic premise of in personam power: that a sovereign, whether it be national or state, can assert personal jurisdiction over any party having a sufficient purposeful relationship with the forum of that sovereign.[104] This premise contemplates two essential, interrelated elements: first, the requisite relationship between the party sought and the sovereign; and second, the concept of forum. The former element, which remains constant for both the state and the federal courts and thus does not distinguish federal jurisdictional power from state jurisdictional power, is defined in terms of either presence within or sufficient contacts with the forum. The latter element, the concept of forum, which is the crux of the distinction between the jurisdictional due process constraints on the state and the federal courts, is a function of the territorial limitations of the sovereign.[105] In other words, the concept and the power of the forum, and thus the differing extents to which state and federal courts may reach the person of a defendant, are not a consequence of the geographic location of the court that is asserting jurisdiction, but rather arise from and are equivalent to the power of the sovereign of which that court is a part.[106]

In the instance of a state court's assertion of personal jurisdiction, the due process clause of the fourteenth amendment, as outlined by the minimum contacts doctrine of *International Shoe*, defines the forum according to state geographic boundaries, these boundaries representing the limits of the state's sovereign power. As a result, a state can exercise personal jurisdiction only over those persons present within the forum or having certain minimum contacts with the state as a sovereign territorial entity.[107]

When in personam power is asserted by a federal court, however, no such state territorial limitation constitutionally adheres.[108] The forum of a federal court is constitutionally defined by the territorial boundaries of the United States as a sovereign nation, not by the geographic limits of the state in which the federal court has its *situs*.[109] Such a definition of the federal forum is a consequence of the fact that a federal court is a part of

104. First Flight Co. v. National Carloading Corp., 209 F. Supp. at 736; *See generally* Abraham, *supra* note 88, at 531-34. As this concept first developed, the relationship between the party over whom jurisdiction was sought and the forum was defined in terms of presence within the territorial boundaries of the sovereign. Pennoyer v. Neff, 95 U.S. at 720; Abraham, *supra* note 88, at 531-32. The concept has evolved to now hold that this relationship is determined by reference to the contacts of the party sought with the forum of the sovereign. International Shoe Co. v. Washington, 326 U.S. at 316-17; Abraham, *supra* note 88, at 533-34.

105. Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390. *See also* Hanson v. Denckla, 357 U.S. at 251.

106. Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390.

107. International Shoe Co. v. Washington, 326 U.S. at 316-17.

108. Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390; Green, *supra* note 85, at 970; Note, *Jurisdiction of Federal District Courts over Foreign Corporations*, 69 HARV. L. REV. 508 (1956).

109. *Id.*

the federal government, whose sovereign power extends nationwide.[110] Thus, the limits of fifth amendment due process on a federal court's in personam reach allow a federal court to assert jurisdiction over any party found within or having a sufficient relationship with the territory of the United States. This concept of a nationwide federal forum has been recognized by the Supreme Court in *United States v. Union Pacific Railroad*,[111] in which the Court noted that a federal court can, under the Constitution, exercise personal jurisdiction through service of appropriate process "anywhere within the limits of the territory over which the federal government exercises dominion."[112] The Court expressly stated that, although Congress had not chosen to so organize the lower federal courts, nothing in the Constitution prevents a federal court from reaching a party found anywhere within the United States.[113] This reference to the constitutional authority of the federal courts clearly includes the fifth amendment's due process constraints. As a result, the due process clause of the fifth amendment poses no obstacle to a federal court's exercise of nationwide in personam jurisdiction, even though fourteenth amendment due process considerations may prevent a similar jurisdictional reach from being effected by a parallel state court. As can be seen by the above analysis, the due process constraints of the fifth amendment imposed on the federal courts are more lenient than those placed on state courts by the fourteenth amendment.

Given this distinction between the constitutional due process authority of state and federal courts to exert personal jurisdiction, the question remains what due process standard is to govern the federal courts' power. In the context of state in personam jurisdiction, the *International Shoe* minimum contacts doctrine has evolved as the standard by which fourteenth amendment due process is to be measured.[114] No comparable due process doctrine has been unequivocally developed for implementation of the fifth amendment's constraints on the federal courts, presumably because Congress generally has not structured the federal judicial power in a manner that would allow federal court assertion of personal jurisdiction to the nationwide limits permitted by the Constitution.[115] In the few cases that have addressed a standard of fifth amendment due process constraints on the federal courts, the majority of lower federal courts have analogized to the *International Shoe* fourteenth amendment minimum contacts doctrine and held that a federal court can assert personal jurisdiction over a party if that party is present within the territorial limits of the United

110. Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390.

111. 98 U.S. 569 (1878). *See also* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1924); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

112. United States v. Union Pacific R.R., 98 U.S. at 603.

113. *Id.* at 604.

114. *See* text accompanying notes 89-97 *supra*.

115. *See* text accompanying notes 119-27 *infra*.

States or has a sufficient nexus (*i.e.* minimum contacts) with the United States.[116] Conversely, one federal court has indicated that the appropriate test to be applied is one based on fundamental fairness to the party over whom jurisdiction is sought.[117] Since fairness is inherent in the *International Shoe* test,[118] an analogy to the minimum contacts doctrine would appear to provide a satisfactory working rule for governance of a federal court's assertion of extraterritorial personal jurisdiction.

Although under the Constitution the federal courts are capable of exercising personal jurisdiction over a party found anywhere within the territory of the United States,[119] Congress need not authorize the federal judiciary to act to the constitutional limits.[120] Indeed, Congress has, through its rule-making delegate, limited the in personam reach of the federal courts by the provisions of Federal Rule of Civil Procedure 4.[121] Federal rule 4(f), relating to the territorial limits of effective service of federal process, begins by stating that "all process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these Rules, beyond the territorial limits of that state."[122] The effect of this provision is to narrow the in personam jurisdiction of the federal courts from the nationwide reach permitted by the Constitution to a jurisdictional reach effective, with certain limited exceptions, only within the state in which the federal court sits. Only when permitted by a federal statute or Rule of Civil Procedure can a federal court exert personal jurisdiction beyond the territorial borders of the state in which it is held.[123] Congress has enacted a few, specialized statutes authorizing extraterritorial or nationwide service of federal process.[124] The federal rules also contain a few provisions for extraterritorial service by a federal court, these primarily being the bulge service of process provision of rule 4(f) and the borrowing provision of rule 4(e).[125]

116. Holt v. Klosters Rederi A/S, 355 F. Supp. at 357; Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. at 390; First Flight Co. v. National Carloading Corp., 209 F. Supp. at 736-37; Abraham, *supra* note 88, at 537; Green, *supra* note 85, at 970.

117. Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. at 198-204. *See also* Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 155 (5th Cir. 1954).

118. International Shoe Co. v. Washington, 326 U.S. at 316-17. *See also* cases cited in note 117 *supra.*

119. *See* text accompanying notes 98-113 *supra.*

120. United States v. Union Pacific R.R., 98 U.S. at 603; Holt v. Klosters Rederi A/S, 355 F. Supp. at 357.

121. FED. R. CIV. P. 4.

122. FED. R. CIV. P. 4(f).

123. *Id.*

124. Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 100-102 (1968). *See, e.g.*, 15 U.S.C. §§ 5, 25 (antitrust actions by the United States); 28 U.S.C. § 1391(e) (actions against federal officers or agencies); 28 U.S.C. § 1692 (certain instances of receivership); 28 U.S.C. § 1695 (stockholders' derivative actions); 28 U.S.C. § 2321 (actions to review Interstate Commerce Commission orders); 28 U.S.C. § 2361 (interpleader); 28 U.S.C. § 2413 (execution in favor of the United States).

125. *See, e.g.*, FED. R. CIV. P. 4(e); FED. R. CIV. P. 45(e); FED. R. CIV. P. 71A(d)(3). *See also* Foster, *supra* note 124, at 100-02.

In the instance of federal statutory authorization of extraterritorial service, or of the bulge process authorization of rule 4(f), the due process constraints of the fifth amendment, outlined above, govern the federal court's exercise of in personam jurisdiction. In such a case, the fourteenth amendment due process restrictions of *International Shoe*, being relevant only to the states, have no constitutionally mandated applicability. Extraterritorial federal service accomplished through the borrowing provision of rule 4(e), however, presents a different situation.

Federal Rule of Civil Procedure 4(e), in pertinent part, states:

> Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.[126]

This provision authorizes a federal district court, attempting to reach a party not found within the territory of the state in which the federal court is held and not amenable to suit under either the federal statutes authorizing extraterritorial service or the bulge process provision of rule 4(f), to borrow the long-arm authority of the state in which the federal court sits.[127] Since state long-arm jurisdiction is subject to the fourteenth amendment due process constraints of the *International Shoe* minimum contacts doctrine, it follows that a federal court borrowing the state long-arm power is also bound by the dictates of *International Shoe*. This imposition of the *International Shoe* minimum contacts doctrine on the federal courts is, however, mandated by Federal Rule of Civil Procedure 4, not by the Constitution, whose due process restrictions permit the federal courts to effect nationwide in personam jurisdiction. Moreover, this intermingling of the fourteenth amendment due process constraints of *International Shoe* with federal in personam authority occurs *only* when the federal court is proceeding under the borrowing provision of rule 4(e). When a federal court is asserting extraterritorial personal jurisdiction on the basis of authority pursuant to rule 4(f) (*i.e.* federal extraterritorial service statutes or the bulge service of process provision), the court is limited solely by the constraints of fifth amendment due process and any limitations imposed by Congress or its rule-making delegate in the grant of extraterritorial authority.

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126. FED. R. CIV. P. 4(e).

127. Under this borrowing provision of rule 4(e), the issue has arisen whether a federal court may assert in personam jurisdiction to the limits permitted by *International Shoe* or whether the court is bound by the jurisdictional reach chosen by the state in which the federal court sits. *See* text accompanying notes 156-96 *infra*. When a state has extended its long-arm jurisdiction to the constitutional limits, the question is largely theoretical inasmuch as both tests of amenability will be identical. A state need not, however, assert jurisdictional power to the limits allowed by *International Shoe*. Perkins v. Benguet Consol. Mining Co., 342 U.S. at 440, 446; Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948). In such a context, the majority of federal courts have followed Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), in holding that the federal court is bound by the state jurisdictional choice. *See* text accompanying notes 168-85 *infra*. *See also* cases cited in note 10 *supra*.

This distinction between the applicable due process constraints on a federal court, depending upon whether the court is asserting personal jurisdiction pursuant to purely federal authority or borrowed state long-arm authority, appears to have evaded some of the federal courts that have considered the issue. Although such confusion will likely not, in the ordinary case, result in any practical difference in outcome,[128] it does represent a major conceptual flaw in analysis of federal in personam power. In *Sprow*, the court expressly grounded its standard of amenability to rule 4(f) bulge service of process on the minimum contacts doctrine of *International Shoe*.[129] The court did not, however, indicate whether it was incorporating the minimum contacts concept into its test of amenability because it felt such a result was compelled by the Constitution or merely because it was reasoning by analogy.[130]

Sprow's incorporation of the *International Shoe* minimum contacts doctrine into its standard for amenability to bulge service of process conceivably may have been predicated upon one of three possible views of constitutional limitations upon federal in personam power. These possibilities are:

(1) federal personal jurisdiction is controlled by the fourteenth amendment, such that application of an *International Shoe* minimum contacts test is mandated by fourteenth amendment considerations of due process;

(2) due process as contemplated by the fifth amendment is the functional equivalent of fourteenth amendment due process, such that, even though a federal court's assertion of in personam jurisdiction pursuant to rule 4(f) is governed solely by fifth amendment due process considerations, constitutional principles demand that an *International Shoe* minimum contacts test of amenability be applied;

(3) the federal courts are limited *solely* by fifth amendment, *not* fourteenth amendment, due process, and these fifth amendment constraints are considerably less restrictive than those imposed on the states by the fourteenth amendment and *International Shoe*—however, in order to formulate a workable and understandable rule of fifth amendment due process, the minimum contacts concept is incorporated by *analogy* into the constraints on the federal courts,[131] such that a federal court can constitutionally reach any person present within or having minimum contacts with the nationwide forum of the United States, subject only to such limitations on a federal court's jurisdictional

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128. This is so primarily because Congress has not, except for a few limited and specialized instances, allowed the lower federal courts to exercise personal jurisdiction to the nationwide limits permitted by the fifth amendment. *See generally* Foster, *supra* note 124, at 99-102.

129. 594 F.2d at 416.

130. The court merely stated that it was "following the basic constitutional principles in the area." *Id.*

131. *See* text accompanying notes 115-18 *supra*.

power as may be imposed by federal statute or rule (such as those imposed by Federal Rule of Civil Procedure 4).[132]

The first two of these possible analyses are clearly at odds with the applicable constitutional principles of federal jurisdictional power. The federal courts are not restricted by fourteenth amendment due process.[133] Moreover, fifth amendment due process, controlling the federal courts, is not the equivalent of the due process constraints of the fourteenth amendment.[134] As a result, if *Sprow* is proceeding on the premise that the *International Shoe* minimum contact doctrine must, out of constitutional necessity, govern bulge service of process because of either of the first two possible approaches advanced above, then the decision must be considered as having a faulty conceptual basis. If, however, *Sprow* is applying the minimum contacts concept to fifth amendment due process by analogy, in accordance with the third approach above, then its reasoning can be reconciled with the general principles of federal in personam jurisdictional power.

Since bulge service of process is an authorized extraterritorial extension of federal jurisdiction pursuant to purely federal law, rather than a federal-state law combination under rule 4(e),[135] the only constraints on a federal court's bulge in personam reach are those of fifth amendment due process, which permits nationwide personal jurisdiction, and of any additional limits imposed by the Supreme Court, as rule-making delegate of Congress, in authorizing the extraterritorial jurisdiction. It is this latter aspect that limits a federal court's reach through bulge jurisdiction. By its own language, rule 4(f) limits bulge service to within 100 miles of the court effecting process.[136] As a result, within this 100 mile bulge the only due process constraints on a federal court's power of personal jurisdiction are those imposed by the fifth amendment, and whether the standard for these constraints be set as a minimum contacts analogy[137] or as a basic fairness test,[138] a federal court can reach any party found within or having a sufficient relationship with the bulge and who otherwise falls within the parameters of rule 4(f). In this regard, *Sprow* noted that due process considerations may prevent a court from reaching a party only temporarily

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132. It is possible that a court may accept this third analysis of the constitutional limitations upon federal in personam jurisdiction, but may then confuse the congressional limitations imposed by rule 4(f) with those imposed by rule 4(e), relating to borrowed state long-arm authority. *See* text accompanying notes 126-27 *supra*. As a result, a court may reach the conclusion that the federal rules require a minimum contacts test of amenability to rule 4(f), as well as rule 4(e), process. Such a conclusion is, however, clearly contrary to the provisions of rule 4, for rule 4(f), unlike the borrowing provision of rule 4(e), makes absolutely no mention of state jurisdictional law. *Compare* text accompanying note 19 *supra with* text accompanying note 126 *supra*.

133. *See* text accompanying notes 98-103 *supra*.

134. *See* text accompanying notes 104-13 *supra*.

135. *See* text accompanying notes 126-27 *supra*.

136. *See* text accompanying note 19 *supra*.

137. *See* text accompanying note 116 *supra*.

138. *See* text accompanying note 117 *supra*.

present within the bulge and having no other meaningful contacts with either the bulge or the forum state.[139] The court, while indicating that it would be fundamentally unfair to exercise jurisdiction over such a party,[140] gave no detailed rationale for this assertion. Since absent the 100-mile limitation on bulge process imposed by the federal rules, a federal court could, at least under the Constitution, effect personal jurisdiction over such a party if found anywhere within the territory of the United States, there does not appear to be any basis of support for this aspect of *Sprow*. Rather, it would seem that a federal court can reach any rule 14 or rule 19 party found within the bulge, regardless of the absence of other contacts. Aside from this disagreement with the due process analysis of *Sprow*, however, this Case Comment adheres to the views of the opinion and, as will be set forth, believes that a *Sprow* standard should be universally adopted to govern rule 4(f) bulge service of process.

C. *The Mandates of the* Erie-York *Doctrine*

In *Erie Railroad v. Tompkins*,[141] the Supreme Court announced the rule that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . Congress has no power to declare substantive rules of common law applicable in a State. . . . And no clause in the Constitution purports to confer such a power upon the federal courts."[142] By this broad mandate, the federal courts cannot shape a substantive body of federal common law in areas traditionally subject to definition by state legislative or judicial power.[143] Accordingly, a federal diversity court, which under the *Erie-York* doctrine is considered to be acting essentially as another court of the state in which it is held,[144] is to apply the substantive law of that state in order to avoid the evils, as recognized by *Erie*, of forum-shopping.[145] Conversely, a federal court is to apply, at least in theory, federal procedure.[146] Due to the difficulty that may arise in attempting to distinguish between substance and procedure (*i.e.* the twilight zone), however, the *Erie* rule was substantially refined in *Guaranty Trust Co. v. York*[147] to hold that state procedural law is substantive for the purposes of *Erie*, and must be followed by a federal diversity court, if disregard of the state procedure would substantially affect the outcome of the litigation.[148]

139. 594 F.2d at 416. *See also* note 70 *supra*.

140. 594 F.2d at 416.

141. 304 U.S. 64 (1938).

142. *Id.* at 78.

143. *Id.*

144. Angel v. Bullington, 330 U.S. 183, 187 (1947); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

145. Hanna v. Plumer, 380 U.S. 460, 468 (1965); Guaranty Trust Co. v. York, 326 U.S. at 109.

146. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

147. 326 U.S. 99 (1945).

148. *Id.* at 108-09.

If the *York* outcome-determinative test is applied to its literal extreme, very few of the Federal Rules of Civil Procedure would have any effect in a federal court action in which subject-matter jurisdiction is grounded on diversity of citizenship.[149] As a result, two exceptions have been carved out of the *Erie-York* doctrine as applied to procedural matters. First, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[150] the Court held that when a state procedural rule is merely one of form and mode not bound up with state-created rights and obligations, a federal diversity court may forego the state rule in favor of federal procedure if the federal procedure is supported by countervailing federal policy considerations of sufficient import to outweigh the general policy of *Erie-York* that state law apply.[151] Second, in *Hanna v. Plumer*,[152] the Court held that when an issue is expressly governed by a validly enacted Federal Rule of Civil Procedure, as tested by the dictates of the Rules Enabling Act,[153] then the federal rule is to be applied regardless of whether a parallel state procedure is outcome-determinative and bound up with state-created rights and obligations.[154]

In the context of the twilight zone question of amenability to suit in a federal diversity court, many, although not all, of the federal courts that have considered the question have found the appropriate test is of an outcome-determinative nature and that the *Erie-York* doctrine compels, at least in part, application of a standard based upon state law.[155]

VI. THE ORIGINAL TWILIGHT ZONE: THE FEDERAL STANDARD-STATE STANDARD CONTROVERSY AND AMENABILITY TO SUIT OF AN ORIGINAL PARTY DEFENDANT

A. *Advocating a Federal Standard*: Jaftex Corp. v. Randolph Mills, Inc.[156]

Given the constraints of due process and the *Erie-York* doctrine,[157] the court in *Jaftex* was faced with the issue whether a foreign corporate defendant could be amenable to suit in a federal diversity court even though it was not subject to the jurisdictional reach of the state courts of the state in which the federal court was held. The court, speaking through

149. C. WRIGHT, *supra* note 10, § 55, at 256-57.

150. 356 U.S. 525 (1957).

151. *Id.* at 536-38. *See also* Szantay v. Beech Aircraft Corp., 349 F.2d 60, 63-64 (4th Cir. 1965).

152. 380 U.S. 460 (1965). *See also* Note, Erie-York *Doctrine Does Not Govern Federal Rules of Civil Procedure*, 27 OHIO ST. L.J. 345 (1966).

153. 28 U.S.C. § 2072 (1976) ("Such rules shall not abridge, enlarge or modify any substantive right. . . ."). *See also* Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

154. 380 U.S. at 469-70.

155. *See* text accompanying notes 156-85 *infra*.

156. 282 F.2d 508 (2d Cir. 1960), *overruled*, Arrowsmith v. United Press Int'l, 320 F.2d 219, 225 (2d Cir. 1963). *See also* note 127 *supra*.

157. The *Hanna* refinement of the *Erie-York* doctrine had not been developed at the time of *Jaftex*.

the late Judge Clark, drafter of the federal rules, concluded that "the question whether a foreign corporation is *present* in a district to permit service of process upon it is one of federal law governing the procedure of the United States courts. . . ."[158] The court recognized the argument that the *Erie-York* doctrine may require a test based upon state law,[159] but rejected it, finding that either the issue was outside the scope of *Erie*,[160] or, if within *Erie*'s coverage, subject to a *Byrd* "countervailing federal policy considerations" exception to *Erie*.[161] The *Jaftex* court, while appearing to engage in a *Byrd* balancing analysis, found support for a federal policy favoring a federal test of amenability to process in federal venue[162] and service statutes,[163] in the statute creating the lower federal courts,[164] and in the view that the essence of federal diversity jurisdiction as created by article III of the Constitution is that citizens of different states are "entitled to the essentials of a trial according to federal standards."[165] Although the *Jaftex* decision is a complicated inquiry into the constitutional and statutory bases of the federal judicial system, as interpreted by both the legislature and the courts,[166] the crux of the opinion is that a nonresident defendant's amenability to suit in a federal diversity court is to be tested by a standard based solely on federal law.[167]

B. *Advocating a State Standard*: Arrowsmith v. United Press International[168]

The federal standard of amenability to service of process upon a nonresident, original party defendant to a diversity action announced in *Jaftex*[169] was short-lived, for it was expressly overruled three years later by the Second Circuit, sitting en banc and speaking through Judge Friendly, in *Arrowsmith*.[170] The court held that the appropriate standard of amenability to suit in a diversity action is to be determined by reference to "the law of the state where the [federal] court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee."[171] The

158. 282 F.2d at 516 (emphasis in original).

159. *Id.* at 512.

160. *Id.* at 513.

161. *Id.*

162. *Id.* at 512, *referring to* 28 U.S.C. § 1391.

163. 282 F.2d at 512; 28 U.S.C. § 1693.

164. 282 F.2d at 516.

165. *Id.* at 513.

166. *Id.* at 516. Judge Clark noted that judicial interpretations of federal policy are of as much significance and precedential value as legislative declarations thereof.

167. *Id.*; Note, 74 HARV. L. REV. 1662 (1961); Note, *Corporate Amenability to Service of Process—Federal Law Applicable to Determine Corporate Presence*, 6 VILL. L. REV. 404 (1961).

168. 320 F.2d 219 (2d Cir. 1963).

169. *See* text accompanying notes 156-67 *supra*.

170. 320 F.2d at 225.

171. *Id.* at 223.

Arrowsmith court conceded that the *Erie-York* doctrine "would not prevent Congress or its rule-making delegate from authorizing a [federal] district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the [parallel] state court would not."[172] The court, however, could find no such congressional authorization in either the concept of federal diversity jurisdiction[173] or the federal statutes and rules relied on by *Jaftex*[174] sufficient to outweigh a state's valid interest in the enforcement of its laws.[175] Moreover, the *Arrowsmith* court noted that it would find no such federal policy favoring a federal test of amenability to suit in a diversity action "in the absence of direction by federal statute or rule."[176] By this statement, the *Arrowsmith* court apparently meant that any federal standard of amenability must be supported by an express congressional dictate.

The *Arrowsmith* analysis of the federal standard-state standard controversy is significant because it appears to apply a *Byrd* balancing approach to the *Erie-York* problems inherent in the issue, as did the *Jaftex* court.[177] As a result, even though *Arrowsmith* held that state law is to control the issue in the context of the amenability to suit of an original party defendant, a federal standard of amenability would not be precluded if an express legislative policy favoring such a test could be found.[178]

Although the *Arrowsmith* holding has been followed by all other circuit courts of appeals,[179] and appears to be consistent with the general principles governing a federal court's utilization of borrowed state long-arm authority under federal rule 4(e),[180] the court in *Arrowsmith* may not have needed to reach the federal-state standard of amenability issue. In *Arrowsmith*, process was served on the nonresident defendant's sole employee in the state in which the action was brought.[181] After holding that state, rather than federal, law must control, the court indicated that the defendant would not be subject to suit under the long-arm statute of the state in which the federal district court sat because of insufficient contacts between the forum state and the defendant.[182] It appears, however, that the court should have initially addressed the issue whether the employee upon whom service was made was an "agent" of the defendant for the purpose of

172. *Id.* at 226.

173. *Id.* at 226, 227 and 230.

174. *Id.* at 225-28.

175. *Id.* at 226.

176. *Id.*

177. Although *Arrowsmith* discounted as irrelevant *Jaftex*'s reliance on the *Byrd* case the court later indicated that a *Byrd* balancing analysis was being applied, stating that the court was "aware of no federal policy of similar strength or constitutional basis [as that in *Byrd*] that would justify disregard of state laws as to when a foreign corporation may be held to answer in a suit like the present." *Id.* at 230.

178. 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 306.

179. *Id.* at 309; C. WRIGHT, *supra* note 10, § 64, at 304. *See* cases cited in note 10 *supra.*

180. *See* text accompanying notes 126-27 *supra.*

181. 320 F.2d at 222.

182. *Id.* at 232-34.

service within the state. Resolution of this question hinges exclusively upon federal law.[183] Had the court considered this agency issue, it would have been unnecessary to reach the questions ultimately decided by *Arrowsmith*. Nevertheless, the *Arrowsmith* position is currently favored by both the majority of federal courts[184] and the American Law Institute.[185]

C. *The Supreme Court's Position on the Original Twilight Zone*

The Supreme Court has not recently addressed the question whether state or federal law is to control amenability to service. The 1898 case of *Barrow Steamship Co. v. Kane*[186] appears to stand for the proposition that a foreign corporation is amenable to suit in a federal diversity court even though the parallel state court cannot entertain the action.[187] As a result, it is fairly arguable that *Barrow* supports a federal test of amenability to service of process,[188] although the decision has been distinguished on the ground that it dealt only with the applicability of a state door-closing statute,[189] and has been criticized as without an adequate explanation for its apparent holding.[190]

Some commentators have expressed the belief that the decision in *National Equipment Rental, Inc. v. Szukhent*[191] indicates that the Supreme Court would approve a federal test of amenability to suit.[192] In *Szukhent*, the Court held that the word "agent" in Federal Rule of Civil Procedure 4(d)(1) is to be interpreted as embodying a federal test of the validity of service of process issued by a federal court.[193] The *Szukhent* opinion, however, can be limited to a very narrow decision on an express provision of the federal rules relating to the manner of federal service of process and, as a result, may not apply to the more abstract and general concept of federal in personam jurisdiction.[194]

Accordingly, until the Supreme Court directly addresses the issue of the appropriate test of amenability to service of federal process, it appears that the various courts of appeals decisions must be considered

183. National Equip. Rental v. Szukhent, 375 U.S. 311, 316-17 (1964).

184. *See* cases cited in note 10 *supra*.

185. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 133-34 (1968) (hereinafter cited as ALI STUDY). *See also* ALI STUDY, TENTATIVE DRAFT No. 2 § 1303 and Commentary at 77-79 (1964); ALI STUDY, TENTATIVE DRAFT No. 1 § 1303 and Commentary at 54-56 (1963).

186. 170 U.S. 100 (1898).

187. *Id.* at 110-12.

188. *See* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d at 514.

189. Arrowsmith v. United Press Int'l, 320 F.2d at 229.

190. *Id.*

191. 375 U.S. 311 (1964).

192. *See* C. WRIGHT, *supra* note 10, § 64, at 304; 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 310 n.51; D. CURRIE, FEDERAL COURTS—CASES AND MATERIALS 837 (2d ed. 1975); F. JAMES, CIVIL PROCEDURE 654 (1965).

193. 375 U.S. at 316-17.

194. 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 310 n.51.

controlling.[195] In the context of the original twilight zone, this means that the amenability to suit of an original party nonresident defendant to a federal diversity action will be tested by a standard based upon the law of the state in which the federal court is held.[196]

VII. THE NEW TWILIGHT ZONE: THE FEDERAL STANDARD-STATE STANDARD CONTROVERSY AND AMENABILITY TO FEDERAL RULE 4(f) BULGE PROCESS

A. *Introduction: Twilight Zones Old and New*

The original twilight zone, discussed in the previous section, dealt with the issue of amenability to suit in the context of an original party defendant to a federal diversity action. By contrast, the new twilight zone raises the question, addressed by *Sprow*,[197] whether the amenability to suit of a party served with federal rule 4(f) bulge process is to be determined by a federal standard based solely on constitutional considerations of due process, or by a standard grounded on state jurisdictional law. In addition to the constitutional standard announced in *Sprow*, other courts, many of which appear to have followed the rationale of *Arrowsmith*, have adopted a test based on either the law of the forum state or the law of the state in which bulge service is made. Moreover, although other decisions have claimed to follow a state law standard of amenability to bulge service of process, it is arguable that they have, at least in part, applied a federal test.

In analyzing these conflicting approaches to the new twilight zone, this Case Comment will scrutinize each in light of the law applied and, when possible, in light of the achievement of the policies of bulge process and the effectiveness of each test in a factual pattern analagous to that presented by the *Sprow* case.

B. *The Forum State Standard of Amenability to Bulge Process*

The minimum contacts doctrine mandates that before a court exercises personal jurisdiction over a nonresident defendant, the defendant have certain minimum contacts with the forum.[198] On this basis, the argument can be made that the *Sprow* constitutional standard of amenability to bulge process—or any similar test that measures a nonresident's amenability by reference to the expanded bulge jurisdiction of the court—contravenes the minimum contacts doctrine because such a test allows the court to assert jurisdiction over the party served if such party has sufficient contacts with the extraterritorial bulge area, without regard to whether the party has any contacts with the forum state.[199]

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195. *See* cases cited in note 10 *supra*.

196. *E.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

197. *See* text accompanying notes 49-81 *supra*.

198. *See* text accompanying notes 89-97 *supra*.

199. Such a result is clearly possible under the *Sprow* standard. *See* 594 F.2d at 415-16.

Facially, this argument militates against a *Sprow*-type standard on the ground that such a test permits the assertion of personal jurisdiction over a nonresident who may have *no contacts whatsoever* with the forum state. Indeed, a minority of the courts that have addressed the amenability to bulge process issue have embraced this rationale,[200] reaching the conclusion that due process requires that the jurisdictional law of the state in which the federal court is held (*i.e.* the forum state) govern, because of the necessity for "certain minimal contacts *with the forum* in order to subject a defendant to in personam jurisdiction."[201] Under this forum state standard, a nonresident is amenable to rule 4(f) bulge process only if he falls within the parameters of the bulge provision,[202] has contacts with the forum sufficient to satisfy the *International Shoe* minimum contacts doctrine,[203] and, when the forum state legislature has chosen to limit the scope of its reach over nonresident litigants, has contacts with the forum state sufficient to satisfy the state long-arm statute.[204]

In addition to its conceptual underpinnings in the *International Shoe* minimum contacts doctrine, the forum state standard also claims support in the premise—concurred in by the state-of-service standard courts[205]—that rule 4(f) does not establish an independent basis for a federal court's jurisdiction but rather relates only to the manner and scope of service of federal process.[206]

There can be no doubt that the constraints of due process apply to bulge service of process. This was expressly recognized by the court in *Sprow*.[207] The answer to the facially appealing assertion of the forum state standard advocates that the *International Shoe* minimum contacts doctrine precludes application of a *Sprow* constitutional standard of amenability to bulge process—or of any other test that allows judicial jurisdiction to be exercised solely on the basis of contacts with the bulge area—is twofold.

First, the minimum contacts doctrine of *International Shoe* is an extension of the due process clause of the fourteenth amendment, and thus is applicable only to a state court's assertion of in personam jurisdiction.[208] The only instance in which the *International Shoe* minimum contacts

200. Karlsen v. Hanff, 278 F. Supp. 864 (S.D.N.Y. 1967). *See also* Deloro Smelting & Ref. Co. v. Engelhard Minerals & Chem. Corp., 313 F. Supp. 470, 475-77 (D. N.J. 1970).

201. Karlsen v. Hanff, 278 F. Supp. at 865 (emphasis added).

202. *See* text accompanying notes 19-23 *supra.*

203. Karlsen v. Hanff, 278 F. Supp. at 865.

204. The court in Karlsen v. Hanff, 278 F. Supp. 864 (S.D.N.Y. 1967), did not discuss this aspect of the forum state standard. The claim has, however, been raised in the cases by parties seeking to avoid the jurisdiction of the court. *See, e.g.*, Sprow v. Hartford Ins. Co., 594 F.2d at 416; Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 251; Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. at 631-32.

205. *See, e.g.*, Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 253.

206. Karlsen v. Hanff, 278 F. Supp. at 865.

207. 594 F.2d at 415.

208. *See* text accompanying notes 98-102 *supra.*

doctrine is relevant to a federal court's exercise of personal jurisdiction is when the court is employing borrowed state long-arm authority pursuant to federal rule 4(e).[209] The due process constraints on a federal court effecting rule 4(f) bulge service of process are those of the fifth amendment,[210] which permit nationwide in personam jurisdiction,[211] and the limitations upon effective service found in the grant of extraterritorial bulge jurisdiction,[212] which limit bulge process to within 100 miles of the federal courthouse.[213] As a result, the *International Shoe* minimum contacts doctrine has no relevance under either the Constitution or the federal rules to rule 4(f) bulge service of process.

Second, a nonresident's nexus is measured in relation to the forum.[214] In the case of rule 4(f) bulge process, the forum—for the purposes of defining the scope of the jurisdictional reach of the court issuing process—is determined not by reference to the traditional concept of state geographic boundaries, but rather by the expanded 100 mile limit imposed by rule 4(f).[215] Thus, in the instance of bulge service of process, the forum is comprised of the state in which the federal courts sits *and* the bulge area created by the 100 mile extension. It is in relation to this expanded federal forum that the contacts of a party served with bulge process are to be measured. In such a context, the notion of territorial forum jurisdiction defined by state geographic boundaries is irrelevant. This concept of an expanded federal forum is merely reflective of the fact that rule 4(f)'s bulge provision is a valid enlargement of a federal district court's territorial jurisdiction pursuant to the congressional power to provide for extraterritorial, and even nationwide, service of federal process.[216] Therefore, there can be no persuasive due process objection to measurement of the contacts of a party served with bulge process by reference to the expanded jurisdictional reach of a federal court acting pursuant to rule 4(f).

Under a forum state standard, the *Sprow* court could not have obtained personal jurisdiction over the third-party defendants Breseman and Frazier because of their near total lack of contacts with the forum state, Louisiana.[217] As a result, defendant Hartford, in order to litigate its claim against the third-party defendants, would be forced to bring a separate action against them, presumably in Mississippi where personal

209. *See* text accompanying notes 126-27 *supra.*

210. *See* text accompanying notes 104-13 *supra.*

211. *Id.*

212. *See* text accompanying notes 126-27 *supra.*

213. *See* text accompanying notes 19-23 *supra.*

214. *See* text accompanying notes 104-06 *supra.*

215. Sprow v. Hartford Ins. Co., 594 F.2d at 415; Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. at 632; Kaplan, *supra* note 19, at 633.

216. Mississippi Publishing Co. v. Murphree, 326 U.S. at 442-43; 4 WRIGHT & MILLER, *supra* note 10, § 1127, at 533.

217. *See* text accompanying notes 62-64 *supra.*

jurisdiction over Breseman and Frazier clearly existed.[218] Although some jurisdictions have indicated that it is better policy to require actions between co-defendants and/or third-party defendants to be litigated separately,[219] such a rule, and the result that would obtain if a forum state standard were employed in a factual pattern similar to that presented by *Sprow*, are clearly contrary to the policy of rule 4(f) to maximize determination of entire controversies in one judicial proceeding.[220]

The forum state standard has been severely criticized, both by later cases[221] and by the commentators.[222] This standard, in effect, hinges the reach of rule 4(f) bulge process on the forum state legislature's choice as to the scope of its long-arm jurisdiction. Since a state need not extend its long-arm authority to the constitutionally permitted limits,[223] maximum effectuation of the rule 4(f) policy of resolution of entire controversies is made contingent upon state policy choices—a result clearly not contemplated by the drafters of rule 4(f),[224] who intended the bulge provision to operate independent of and without regard to the jurisdictional principles of the state in which the federal court is held.[225] Bulge service of process was intended to serve as a mechanism enabling federal courts to adjudicate controversies which parallel state judicial systems do not or cannot accommodate.[226] By conditioning the scope of federal bulge process on state policy choices, the very purpose of the provision is defeated.

Moreover, to require that a nonresident defendant be amenable to forum long-arm jurisdiction before such defendant can be reached with bulge process totally destroys the effectiveness of the 100-mile provision by reducing it to nothing more than a second means to serve process on a party already subject to the jurisdiction of the court through a combination of minimum forum contacts and rule 4(e) borrowed state long-arm authority.[227] It seems highly illogical and inconsistent with the integrity and purposes of the federal rules to construe a validly enacted provision to have no effect other than one which could already be realized

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218. *See* text accompanying note 50 *supra*.

219. *E.g.*, Liebhauser v. Milwaukee Elec. Ry. & Light Co., 180 Wis. 468, 193 N.W. 522 (1923).

220. *See* text accompanying notes 31-48 *supra*.

221. Sprow v. Hartford Ins. Co., 594 F.2d at 417; Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 251-52; Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. at 632; Pierce v. Globemaster Baltimore, Inc., 49 F.R.D. at 66 n.3. Although *Coleman* did not expressly overrule *Karlsen*, it recognized that *Karlsen* was analagous to the district court opinion reversed by *Coleman*. 405 F.2d at 251.

222. 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 314-15, § 1127, at 534-35; 2 MOORE, *supra* note 10, § 4.42(2), at 538 n.2; Kaplan, *supra* note 19, at 630-31.

223. Perkins v. Benguet Consol. Mining Co., 342 U.S. at 440, 446; Pulson v. American Rolling Mill Co., 170 F.2d at 194.

224. *See* text accompanying notes 31-48 *supra*.

225. Vestal, *supra* note 19, at 1060-61.

226. Kaplan, *supra* note 19, at 632.

227. Sprow v. Hartford Ins. Co., 594 F.2d at 417; Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 251-52; 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 314, and § 1127, at 535.

under existing authority.[228] Clearly, the drafters of rule 4(f) intended the bulge provision to accomplish more than a mere imitation of the other provisions of rule 4 relating to a federal court's authority to exert personal jurisdiction over nonresidents. A forum state standard of amenability, however, places just such a meaningless interpretation on the bulge service of process provision. For these reasons, the forum state standard should no longer be followed.

C. *The State-of-Service Standard of Amenability to Bulge Process*

In *Arrowsmith*, the Second Circuit expressly left open the question of the standard to be utilized in determining a nonresident defendant's amenability to suit when process is served pursuant to the bulge provision of federal rule 4(f).[229] The court resolved this issue in *Coleman v. American Export Isbrandtsen Lines, Inc.*,[230] holding that "process can be validly served in another state within the 'bulge' created by rule 4(f) only on persons over whom that state has jurisdiction and, very likely, only on persons over whom [the state in which service is made] has chosen to exercise [jurisdiction]."[231] This "bulge state"[232] or "state of service" standard of amenability to federal rule 4(f) bulge process is, like the forum state standard, predicated on the assumption that rule 4(f) relates only to the manner and scope of extraterritorial service of federal process, but does not speak to the issue of when the party served is subject to the jurisdiction of the court.[233] Thus, before bulge process can be effected under the *Coleman* standard, it must be determined not only that the party to be served falls within the parameters of rule 4(f)'s bulge provision[234] and is present within the bulge, but also that such party is amenable to suit in the courts of the state in which bulge service is made.[235] In order to fulfill this latter aspect of the *Coleman* state-of-service test, the party to be served must either be a resident of the state of service,[236] or, if a nonresident, have contacts with the state of service sufficient to satisfy both the due process mandates of the *International Shoe* minimum contacts doctrine and the requirements of the state of service long-arm statute[237]—which may or may not extend to the constitutional limits.[238]

228. *E.g.*, FED. R. CIV. P. 4(e), (f).

229. 320 F.2d at 228 n.9.

230. 405 F.2d 250 (2d Cir. 1968).

231. 405 F.2d at 252.

232. "The 'bulge' state is the state where the third-party defendant is served and which is not the forum state." Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. at 764 n.10.

233. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 253.

234. *See* text accompanying notes 19-23 *supra*.

235. 405 F.2d at 252.

236. In *Coleman*, the party served with bulge process was a resident of the state of service. *Id.* at 251.

237. *See* text accompanying notes 89-97 *supra*.

238. Perkins v. Benguet Consol. Mining Co., 342 U.S. at 440, 446; Pulson v. American Rolling Mill Co., 170 F.2d at 194.

In *Coleman*, plaintiff brought suit in the Southern District of New York on a federal claim for relief arising in Hoboken, New Jersey.[239] Defendant American Export brought a third-party action for indemnification under federal rule 14(a) against Atlantic & Gulf Stevedores, Inc. (Atlantic), a Pennsylvania corporation with its principal office and place of business in Philadelphia, but doing no business in New York.[240] Process was served upon Atlantic at its Philadelphia office pursuant to rule 4(f)'s bulge provision.[241] The district court granted Atlantic's motion to dismiss for lack of personal jurisdiction on the basis that Atlantic did not have sufficient contacts with New York to allow the court to assert jurisdiction.[242] In reversing the district court and announcing the state of service standard, the Second Circuit stated that "[t]here can be no doubt whatever that Pennsylvania can and does provide that a Pennsylvania corporation with its principal office in Pennsylvania and doing business there can be validly served at its headquarters in Philadelphia."[243]

By this express reference to the jurisdictional law of the state in which bulge service was made, Pennsylvania, it is clear that the *Coleman* standard of amenability places prime emphasis on whether or not the party served is amenable to suit in the courts of the state of service, without regard to whether such party has a sufficient relationship with the forum state to allow assertion of borrowed forum state long-arm jurisdiction.[244] In this regard, the *Coleman* state-of-service test is more closely aligned with the *Sprow* constitutional standard than with the forum-state test, in that both *Coleman* and *Sprow* measure the amenability of a party served with bulge process by reference to that party's relationship with the expanded bulge jurisdiction of the federal court. Unlike *Sprow*, however, *Coleman* conditions the availability of bulge service of federal process on state law.

In the factual pattern presented by the *Sprow* case,[245] it is unclear whether the court could have obtained jurisdiction over the persons of the third-party defendants had the court applied a *Coleman* state-of-service test of amenability, primarily because the *Sprow* court made no mention of the law of the state in which bulge service was made, Mississippi.[246] Because the third-party defendants were residents of the state of service,[247] however, it can fairly be assumed that they would have been amenable to

239. 405 F.2d at 251.

240. *Id.*

241. *Id.* Philadelphia is within 100 miles of the Southern District of New York federal courthouse.

242. *Id.* The district court employed a forum state standard of amenability to bulge process. *See* note 221 *supra.*

243. 405 F.2d at 252, *citing* 12 P.S. APP. R.C.P. Nos. 2179 and 2180.

244. 405 F.2d at 251-52.

245. *See* text accompanying notes 49-61 *supra.*

246. *See* text accompanying note 71 *supra.*

247. 594 F.2d at 414.

suit there, such that a *Coleman* standard would have allowed the *Sprow* court to reach the third-party defendants.[248] As a result, the outcome of the *Sprow* case would likely have been the same under either a constitutional standard or a state-of-service standard.

Circumstances may arise, however, in which a state-of-service test of amenability would be ineffective to allow a federal court to reach a party sought through bulge service of process.[249] When the party sought is a nonresident of both the forum state and the state of service, the court's power to reach the defendant will hinge upon the long-arm authority of the state of service. If the long-arm jurisdiction of that state extends to the constitutional limits permitted by *International Shoe*, then the court will be able to reach the party sought regardless of the test of amenability used.

But when the state of service has, for policy reasons, chosen to limit the scope of its long-arm jurisdiction to a point at which the party sought to be served with bulge process could not be reached by the courts of that state, a *Coleman* standard of amenability will prove ineffective even though the party sought may have a nexus with the bulge area sufficient to satisfy the minimum contacts doctrine of *International Shoe*. In such a case, only a standard of amenability based solely on constitutional principles and the express limitations of rule 4(f), without regard to state law, will allow the court to obtain jurisdiction over the party sought. This, in essence, means application of a *Sprow* test of amenability. Given the strong policy of the federal rules in general, and rule 4(f) in particular, favoring resolution of entire controversies in one judical proceeding,[250] it is clear that a *Sprow*-type standard of amenability to bulge process—grounded exclusively on the constitutional limits of the fifth amendment and the legislative limits on bulge process imposed by the grant of extraterritorial bulge power, without restraint by state jurisdictional law—is of much greater practical value than a test based upon state law. Only a federal standard will allow realization of the policies supporting rule 4(f) bulge service of process in the greatest number and variety of circumstances.

The *Coleman* state-of-service standard, and the cases following it,[251] are clearly attempting to further the bulge process goal of determination of entire controversies by freeing bulge service from the necessity of a nexus between the party served and the forum state sufficient to permit the forum to assert state long-arm jurisdiction.[252] As stated in *Coleman*, "if the [bulge

248. *See* text accompanying notes 234-38 *supra*.

249. 4 WRIGHT & MILLER, *supra* note 10, § 1127, at 534-35.

250. *See* text accompanying notes 31-48 *supra*.

251. Spearing v. Manhattan Oil Trans. Co., 375 F. Supp. 764 (S.D.N.Y. 1974); Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. 630 (E.D. La. 1976); Pierce v. Globemaster Baltimore, Inc., 49 F.R.D. 63 (D. Md. 1969); McGonigle v. Penn-Central Transp. Co., 49 F.R.D. 58 (D. Md. 1969). *See generally* School Dist. v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978); R. Clinton Const. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838 (N.D. Miss. 1977).

252. 405 F.2d at 252 n.2.

service of process] amendment had done no more than [simply allowed service outside the state where the court is sitting with respect to persons already subject to the jurisdiction of that state] it would have accomplished little."[253] To the extent that the state-of-service standard achieves the rule 4(f) policies, it is laudable.

The rationale for the *Coleman* decision, however, is unclear and the holding is without adequate explanation. The *Coleman* court appears to claim that state law must be relied upon to determine amenability to service of process not only because of the possible constraints of the *Erie-York* doctrine,[254] but also because rule 4(f) does not provide an independent basis for a federal court's assertion of personal jurisdiction.[255] This premise may be an incorrect interpretation of rule 4(f). The Notes of the Advisory Committee on Rule 4(f) state that "any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in" by bulge service of process.[256] A plain reading of this comment would seem to indicate that the drafters of rule 4(f) believed that the bulge provision supplied grounds for federal in personam jurisdiction and merely omitted an independent basis for the remaining requisites of federal judicial action—venue and subject-matter jurisdiction. A literal reading of the bulge provision also supports this conclusion. At least one commentator has stated that rule 4(f) bulge service of process is a means, in and of itself, to obtain personal jurisdiction over persons within its coverage.[257] This result appears more consistent with the language of rule 4(f) and the Notes of the Advisory Committee, and it appears to refute the claim—made by *Coleman*—that the bulge provision relates only to the manner and scope of service of federal process, not to amenability.

Coleman can also be faulted for introducing state law principles of jurisdiction and fourteenth amendment *International Shoe* due process considerations into a federal scheme in which they have no relevance.[258] Federal in personam jurisdiction is subject to fourteenth amendment due process only when the federal court is borrowing state long-arm authority under rule 4(e).[259] Absent such circumstances, the due process constraints on the federal courts are determined solely by reference to the fifth amendment and to any legislative limitations placed by statute or rule on the lower federal courts.[260]

Moreover, given the close similarity of the issues presented by the *Coleman* and *Arrowsmith* cases, it would seem that, on the basis of

253. *Id.* at 251-52.

254. *Id. See also* Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. at 632.

255. 405 F.2d at 253.

256. *Advisory Committee's Notes, supra* note 31, at 629.

257. Vestal, *supra* note 19, at 1061 n.45. *See also* Foster, *supra* note 124, at 98-99, 100-02.

258. *See* text accompanying notes 279-315 *infra.*

259. *See* text accompanying notes 126-27 *supra.*

260. *Id.*

precedent, *Coleman* should follow *Arrowsmith* in requiring that a standard of amenability to suit be determined solely by "the law of the state where the [federal] court sits."[261] Although *Coleman* cites *Arrowsmith* as precedent,[262] it does not appear to subscribe to the *Arrowsmith* rationale. And even though a *Coleman* state-of-service standard more effectively affords realization of the policy goals of rule 4(f) than would a forum state standard apparently dictated by a literal reading of *Arrowsmith*, *Coleman* fails to distinguish *Arrowsmith*, does not address the underlying *Erie-York* problems so thoroughly discussed by *Arrowsmith*, and offers absolutely no explanation for its holding that rule 4(f) bulge process can be served validly only if the law of the state in which bulge service is made so allows. As a result of these unanswered issues and the fact that situations may arise in which the purposes of bulge service of process would be thwarted by application of a state-of-service standard,[263] the *Coleman* test is susceptible to criticism as illogical,[264] without an adequate rationale, and—in light of the effectiveness with which a constitutional standard of amenability to bulge process attains the goals of rule 4(f)[265]—as an inefficient attempt to achieve its stated purpose of furthering the ease of adjudicating complicated controversies. For these reasons, the state-of-service standard of amenability to rule 4(f) bulge service of process is unacceptable.

D. *Towards a Federal Standard: Cases with an Equivocal Federal Test*

In three opinions, *McGonigle v. Penn-Central Transportation Co.*,[266] *Pierce v. Globemaster Baltimore, Inc.*,[267] and *Pillsbury Co. v. Delta Boat & Barge Rental, Inc.*,[268] there are indications of the development of a federal test of amenability to bulge process, although the exact holdings of these cases are uncertain.[269] In *McGonigle*, in which the action was based on a federally created cause of action,[270] the court appeared to hold that

261. Arrowsmith v. United Press Int'l, 320 F.2d at 223. *See also* 4 WRIGHT & MILLER, *supra* note 10, § 1127, at 535 ("The holding of *Arrowsmith* . . . seem[s] to require the application of forum law.") *But see* 2 MOORE, *supra* note 10, § 4.42(2), at 538 ("While the holding of *Arrowsmith* . . . continues to be followed, the amenability of a foreign corporation to [bulge] service of process is determined by the law of the state where service is made.").

262. 405 F.2d at 252-53.

263. *See* text accompanying notes 245-50 *supra*.

264. 4 WRIGHT & MILLER, *supra* note 10, § 1127, at 535 ("Service under the law of the state of service . . . seems illogical. Of what relevance is the fact that defendant is amenable to process in a particular area of New Jersey when the action is lodged in the Southern District of New York?").

265. *See* text accompanying notes 245-50 *supra*.

266. 49 F.R.D. 58 (D. Md. 1969).

267. 49 F.R.D. 63 (D. Md. 1969).

268. 72 F.R.D. 630 (E.D. La. 1976).

269. *See* Lee v. Ohio Cas. Ins. Co., 445 F. Supp. 189, 193-94 (D. Del. 1978), in which the court recognized the controversy surrounding the appropriate standard of amenability to bulge process, but refused to decide the issue, holding instead that the party sought was amenable under all of the tests previously set forth in the cases.

270. 49 F.R.D. at 59.

personal jurisdiction over a third-party defendant can be obtained pursuant to federal rule 4(f) bulge service of process if the party served has a sufficient nexus with the bulge area, this nexus being determined in light of the minimum contacts doctrine of *International Shoe*.[271] The court also noted, however, that the party served was amenable to suit in the state of service, under that state's laws, and that the state of service had chosen to exercise jurisdiction over the class of persons to which the party served belonged.[272] Because of this express reference to the *Coleman* state-of-service standard, it is unclear whether *McGonigle* is espousing a federal or a state standard of amenability. Moreover, in *Pierce*, in which diversity of citizenship formed the basis of the original action,[273] the court relied heavily not only on its earlier decision in *McGonigle*,[274] but also on a *Coleman* state of service analysis.[275] *Pillsbury*,[276] like *McGonigle* and *Pierce*, similarly claims to have embraced *Coleman*,[277] although the court made no reference to the law of the state in which bulge service was made.

As a result of this lack of clarity regarding which standard is being applied, the most that can be said of these opinions is that they may indicate a willingness to adopt a federal standard of amenability to bulge process, at least when the original action is grounded on a federally created right.[278] In light of the ambiguity of these decisions, evaluating them in terms of the policies of rule 4(f) and a *Sprow* factual pattern would be futile.

VIII. INTO THE TWILIGHT ZONE: FITTING A CONSTITUTIONAL STANDARD OF AMENABILITY TO BULGE PROCESS INTO THE *Erie-York Doctrine*

A. *Introduction: In the Shadow of* Erie

Having concluded that neither considerations of constitutional due process nor the Federal Rules of Civil Procedure require a state law test of amenability to bulge process, and that a *Sprow* constitutional standard is of much greater practical value than those tests previously applied, the remaining inquiry focuses on the most serious obstacle to a federal standard of amenability to bulge process and the very heart of the twilight

271. 49 F.R.D. at 62-63. The court relied on the standard developed by Kaplan, *supra* note 19, at 633. *See also* note 67 *supra*.

272. 49 F.R.D. at 63 n.6.

273. *Id.* at 64.

274. 49 F.R.D. at 66-67.

275. *Id.*

276. *Pillsbury* did not indicate whether the action was based on diversity or a federally-created claim for relief.

277. 72 F.R.D. at 632.

278. In *Pierce*, the court noted that different tests of amenability may apply depending upon whether the action is grounded on diversity of citizenship or a federal right. The court, however, discussed the issue only in the context of a forum state standard of amenability, which it rejected. 49 F.R.D. at 66.

zone—whether the *Erie-York* doctrine requires that amenability to rule 4(f) bulge service of process be determined by a standard based upon state law.

The necessity of addressing this *Erie-York* problem arises from the original twilight zone represented by the *Jaftex-Arrowsmith* controversy.[279] Both *Jaftex* and *Arrowsmith* focused on the applicable test of amenability in light of the *Erie-York* doctrine,[280] and *Arrowsmith* relied, at least in part, on *Erie* in reaching its holding that state law is to govern the amenability to suit of an original party defendant to a federal diversity action.[281] Moreover, *Coleman*, which adopted the state-of-service standard of amenability to bulge process,[282] was decided by the same court as *Arrowsmith*, and *Coleman* cites *Arrowsmith* as authority for its holding that state law controls.[283] This, at least arguably, casts the shadow of the *Erie-York* doctrine onto the issue of amenability to suit under the federal rule 4(f) bulge service of process provision.

B. *The Apparent Effect of the* Erie-York *Doctrine*

If the issue of the appropriate standard of amenability to bulge service of process is considered to be one of substantive law, then *Erie*—with its dictate that federal diversity courts[284] follow state substantive law and policy as closely as practicable—clearly demands a standard based upon state law.[285] As this Case Comment has suggested throughout, however, the question falls into the indistinct twilight zone between substance and procedure, such that whether federal or state law controls hinges upon an analysis of the *York* outcome-determinative test, the *Byrd* doctrine of countervailing federal policy considerations, and the *Hanna* exception to *Erie*.[286]

When the issue has related to the amenability to suit of an original party defendant to a diversity action, as in *Jaftex* and *Arrowsmith*,[287] the

279. *See* text accompanying notes 156-85 *supra*.

280. Arrowsmith v. United Press Int'l, 320 F.2d at 226; Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d at 512-13.

281. Arrowsmith v. United Press Int'l, 320 F.2d at 226.

282. *See* text accompanying notes 229-44 *supra*.

283. Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d at 2.

284. The *Erie-York* doctrine does not apply to actions based on the Constitution, Acts of Congress, or treaties of the United States. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). The law is well-settled that, in a suit in federal court based on a federally created right, amenability to process is determined solely by reference to federal law. Fralely v. Chesapeake & O. Ry., 397 F.2d 1, 3-4 (3d Cir. 1968); Lone Star Package Car Co. v. Baltimore & O. Ry., 212 F.2d 147, 155 (5th Cir. 1954); C. WRIGHT, *supra* note 10, § 64, at 303; 4 WRIGHT & MILLER, *supra* note 10, § 1075, at 302. *See also* Richards v. United States, 369 U.S. 1 (1962); United States v. Standard Oil Co. of California, 332 U.S. 301 (1947). *But see* Gkiafis v. Steamship Yiosonas, 342 F.2d 546, 548-49 (4th Cir. 1965).

285. *See* text accompanying notes 141-55 *supra*.

286. Erie R.R. v. Tompkins, 304 U.S. at 78. One commentator, however, has suggested that a federal court may forego state substantive, as well as procedural, law under the *Byrd* doctrine of countervailing federal policy considerations. Vestal, Erie Railroad v. Tompkins: *A Projection*, 48 IOWA L. REV. 248, 268-69 (1963).

287. *See* text accompanying notes 156-85 *supra*.

courts have generally agreed that the amenability standard issue is outcome-determinative.[288] Moreover, the majority of courts have not found any countervailing considerations of federal policy of sufficient weight to allow application of a federal test.[289] As a result, a test of amenability based upon state law has generally been required.[290]

Because of the similarity of the issues presented by the *Jaftex-Arrowsmith* cases and the *Sprow-Coleman* cases, the following discussion will proceed on the premise, supported at least presumptively by the *Erie-York* doctrine, that the standard used to determine amenability to bulge service of process is also outcome-determinative, such that state jurisdictional law must control the issue unless a federal standard can be found permissible either as explicitly mandated by the Federal Rules of Civil Procedure, favored by countervailing federal policy considerations, or outside of the contemplation of the *Erie-York* doctrine.

C. *A Constitutional Standard of Amenability to Bulge Process and the* Hanna *Exception to the* Erie-York *Doctrine*

When an issue is governed by a validly enacted Federal Rule of Civil Procedure, a federal diversity court will apply the federal procedure, regardless of whether a contrary state procedure is outcome-determinative.[291] Although rule 4(f) does not, on its face, expressly adopt a federal standard of amenability to bulge service of process, it is fairly arguable that such a test is contemplated by the rule.

Rule 4(f) begins by stating that, in general, process issuing from a federal district court is valid only within the territorial boundaries of the state in which the federal court sits.[292] The rule then goes on to create an exception to this general limitation on the reach of federal process—namely, that federal process may be served beyond the territorial limits of the state in which the federal court is held when authorized by a federal statute or by a Federal Rule of Civil Procedure.

The bulge service of process provision of rule 4(f) states that it is to be "in addition" to these authorizations of extraterritorial service.[293] This language indicates that the bulge provision is, in and of itself, an authorization of extraterritorial federal process in the limited situations to which bulge process is applicable. As a result, the bulge process provision of rule 4(f) must be considered the equivalent of such other statutes and rules recognized by the preceding clause of rule 4(f) as authorizing extraterritorial service of federal process.[294]

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288. Annotation, 6 A.L.R.3d 1103, 1124-25 (1966).

289. Arrowsmith v. United Press Int'l, 320 F.2d at 225-26.

290. *See* cases cited in note 10 *supra.*

291. Hanna v. Plumer, 380 U.S. 460, 469-74 (1965). *See also* text accompanying notes 141-55 *supra.*

292. FED. R. CIV. P. 4(f). *See* text accompanying notes 119-25 *supra.*

293. FED. R. CIV. P. 4(f).

294. Vestal, *supra* note 19, at 1061; Kaplan, *supra* note 19, at 632.

In the instance of extraterritorial authorization to borrow state jurisdictional law under rule 4(e), it is clear that amenability to the extraterritorial federal process should be determined in accordance with the law of the state whose long-arm authority is utilized. When extraterritorial process issues solely on the basis of a federal statute or rule, however, amenability to such process is to be determined under a federal test.[295] In such a case, amenability to process is an issue to be resolved solely by reference to federal principles of in personam jurisdiction, without restraint of state law.[296]

The rule 4(f) bulge process provision falls within this latter category of extraterritorial authority. By the very language of rule 4(f), bulge service of process—unlike rule 4(e) borrowed state process—operates solely of its own accord, without looking to state law for its substance. Although no court has yet interpreted the "in addition" language of rule 4(f) to mean that the bulge provision is equivalent to federal statutes providing for nationwide service of federal process, and thus subject to a federal test of amenability, such a construction is plausible and consistent with the general scheme of federal rule 4.

Moreover, by its own language, the bulge process provision is limited to the federal modes of service allowed by rule 4(d)(1)-(6).[297] State methods of service generally available to the federal courts by rule 4(d)(7) are not permitted under the bulge provision. This exclusion of state service devices is indicative of the intent of the drafters of rule 4(f) that bulge service of process should operate free of the scope of process of the state in which the federal court is held.[298] It seems incongruous to interpret the bulge provision as requiring a state law test of amenability when the clear thrust of the provision is that it should have effect without regard to state law.[299]

On these bases—that the rule 4(f) bulge provision is the equivalent of federal statutes authorizing nationwide federal process and thus subject to a federal test of amenability, and that bulge process was intended to be free of state jurisdictional law—it may be asserted that the bulge service of process provision of rule 4(f) implicitly contemplates a federal standard of amenability, such that the issue is within the scope of the *Hanna* exception to the *Erie-York* mandate that state law be followed.

D. *A Constitutional Standard of Amenability to Bulge Process and the* Byrd *Doctrine of Countervailing Federal Policy Considerations*

Under the doctrine of countervailing federal policy considerations announced in *Byrd*, a federal diversity court may follow federal procedure

295. Foster, *supra* note 124, at 97-98. *See* text accompanying notes 119-40 *supra*.

296. *Id.*

297. FED. R. CIV. P. 4(f).

298. Vestal, *supra* note 19, at 1061; *citing Memorandum on Comments of the Reporter to the Advisory Committee on Federal Rule of Civil Procedure 4(f).*

299. Vestal, *supra* note 19, at 1060-61.

not explicitly covered by the federal rules—even though a parallel state procedure is outcome-determinative—if the federal practice embodies a federal policy of sufficient importance to outweigh a state's valid interest in application of its law.[300] This type of approach to the standard of amenability issue appears to have been recognized and applied in *Arrowsmith*, even though the court there found no express federal policy favoring a federal test of the amenability to suit of an original party defendant in a diversity action.[301]

In the context of rule 4(f) bulge service of process, however, there appears to be a more compelling basis for finding countervailing considerations of policy sufficient to override state law. Bulge process reflects a policy, found throughout the federal rules and jurisdictional statutes, of resolution of complex controversies in one judicial proceeding.[302] It is a clear indication of the strong federal interest in just and efficient determination of multiparty, multistate litigation encompassing a scope far broader than the law of any one state.[303] Underlying bulge process is the recognized necessity for the existence of a federal judicial system capable of adjudication of controversies which the state court systems do not and cannot accommodate.[304] The integrity of such a federal system can best be maintained by allowing trial by federal standards[305]—a legitimate federal interest[306]—particularly when the federal courts are, as in the case of rule 4(f) bulge process, exercising extraterritorial jurisdiction that has no counterpart in the parallel state judicial systems.

These federal policies favored by rule 4(f) bulge process appear to be of sufficient gravity, under a *Byrd* analysis, to allow a federal diversity court to forego a state law standard of amenability arguably required by the *Erie-York* doctrine and to adopt a test of amenability to bulge process founded solely on federal law. Although it may be asserted that these policies do not rise to the constitutional level of the issue in *Byrd*—and thus are not sufficient to outweigh state law—it appears that countervailing federal considerations may also arise from federal statutes,[307] and perhaps even by implication.[308] As such, policies favored by the Federal Rules of

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300. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-38 (1957). *See also* text accompanying notes 141-55 *supra*.

301. Arrowsmith v. United Press Int'l, 320 F.2d at 226.

302. *See* text accompanying notes 31-48 *supra*.

303. Vestal, *supra* note 286, at 269-70.

304. *Id.* at 269; Kaplan, *supra* note 19, at 632.

305. Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d at 513.

306. Vestal, *supra* note 286, at 268.

307. Arrowsmith v. United Press Int'l, 320 F.2d at 256-58. *See also* Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y. 1967). *But see* Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956) *and* Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960) (both apparently require that federal policy considerations be of a constitutional stature).

308. Note, 74 HARV. L. REV. 1662, 1665 (1961).

Civil Procedure should be of sufficient import to justify a *Byrd* balancing analysis.[309]

A more imposing obstacle to deciding that a federal standard of amenability to bulge process is permissible in a diversity action by a *Byrd* exception to *Erie* is the apparent requirement of *Byrd* that a parallel state practice be merely one of form and mode not bound up with state-created rights and obligations.[310] The impact of this aspect of *Byrd* appears to be that if the state procedure at issue is a clear expression of state policy, rather than merely a matter of administrative or judicial convenience, then the state law must be followed regardless of the presence of countervailing considerations of federal policy.[311] Therefore, under a *Byrd* approach to the standard of amenability issue, it would seem that a balancing analysis of the countervailing federal and state policies is necessary on a case-by-case basis, with the availability to a federal diversity court of a federal standard of amenability to bulge process hinging upon the merits of the state policy that supports the parallel state rule.

E. *Inapplicability of the* Erie-York *Doctrine to Federal Rule 4(f) Bulge Process Amenability Issues*

As suggested by the preceding discussion, the apparent mandate of the *Erie-York* doctrine that a state law standard of amenability govern bulge process issued by a federal diversity court may possibly be overcome by a *Hanna* or *Byrd* analysis of the quesiton, although there are obstacles—some perhaps insurmountable—to these approaches. The foregoing discussion, however, was based upon the assumption that, under *York*, a standard of amenability to bulge process would be considered outcome-determinative and thus substantive for the purposes of *Erie*. If that is the case, and if the twilight zone issue cannot be resolved in favor of a federal test of amenability by either a *Hanna* or *Byrd* analysis, then *Erie* clearly demands that state law control. It may be, however, that the question of the appropriate test of amenability to rule 4(f) bulge service of process is outside the scope of the *Erie-York* doctrine.

The *Erie-York* doctrine was developed in an attempt to eliminate forum-shopping by requiring that the outcome in a federal diversity court be substantially the same as that which would obtain in a parallel state court.[312] Underlying the assertion of *Erie* that forum-shopping is an evil to be avoided is the premise that a federal diversity court is essentially just

309. Lumberman's Mut. Cas. Co. v. Wright, 322 F.2d 759 (5th Cir. 1963) (federal policy of rule 41(b)); Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960) (federal policy of rule 43(a)); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959) (federal policy of rule 25(a)); Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y. 1967) (federal policy of rule 4(f)).

310. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. at 536-38; Szantay v. Beech Aircraft Corp., 349 F.2d at 63-64.

311. Vestal, *supra* note 286 at 268-69.

312. Erie R.R. v. Tompkins, 304 U.S. at 78; Guaranty Trust Co. v. York, 326 U.S. at 108-09.

another court of the state in which the federal court is held, so that the jurisdictional reach and adjudicative abilities of the state and federal diversity court systems should, as nearly as practicable, be identical.[313]

This assumption, however, ignores the reality that there are legal controversies incapable of resolution by state judicial systems, and that are uniquely suited for adjudication in the context of federal diversity jurisdiction.[314] Rule 4(f)'s bulge service of process provision was promulgated to remedy just such a deficiency in state judicial capability by providing an available federal forum for certain types of complex multiparty, multistate litigation.[315] Such a situation was not contemplated by the *Erie-York* doctrine. *Erie*'s policy of avoiding forum-shopping was conceived in the context of legal actions that could be litigated in either the federal or state courts. Rule 4(f) bulge service of process relates to controversies that are incapable of resolution by state courts. This distinction would appear to place bulge service of process outside of the forum-shopping concern of *Erie*.

Moreover, although the availability of rule 4(f) bulge service of process may lead to forum-shopping by fostering a preference for a federal forum in which all parties necessary for complete resolution in one proceeding can be reached, such an outcome was clearly intended by the drafters of rule 4(f). At least in this instance, forum-shopping cannot be regarded as an evil to be absolutely avoided. Rather, it must be viewed as a trade-off that allows the federal courts to resolve complex litigation in the most efficient—and perhaps the only possible—manner. At least one commentator has suggested that the mandates of *Erie* are inappropriate when the issues awaiting adjudication are of a complex multiparty, multistate nature requiring law broader than that available in any one state.[316] This appears to be a particularly well-reasoned perspective when rule 4(f) bulge service of process is at issue, given its policy to aid in the resolution of just such complicated controversies.

The *Erie-York* doctrine was developed in the context of judicial systems exercising personal jurisdiction within the constraints imposed by traditional concepts of geographically determined state territorial boundaries. Federal rule 4(f) bulge process, however, is an exercise of extraterritorial jurisdiction limited not by geographic considerations, but rather by legislative policy decisions in an area in which Congress or its rule-making delegate may provide for nationwide federal jurisdiction.[317] Unlike traditional methods of service of process that exist in both the state and federal judicial systems, bulge service of process is a creature of federal

313. Guaranty Trust Co. v. York, 326 U.S. at 108-09.

314. Kaplan, *supra* note 19, at 632.

315. *Id.*

316. Vestal, *supra* note 286 at 271.

317. Mississippi Publishing Corp. v. Murphree, 326 U.S. at 442; Sprow v. Hartford Ins. Co., 594 F.2d at 416; Arrowsmith v. United Press Int'l, 320 F.2d at 226. *See also* FED. R. CIV. P. 4(f).

law and is unique to the federal system. Moreover, the concept of an expanded federal forum found in rule 4(f)'s bulge provision has no counterpart in the parallel state court systems. It seems incongruous to attempt to fit federal policies and devices such as bulge process and extraterritorial diversity jurisdiction into a theoretical and precedential mold, such as the *Erie-York* doctrine, that is built upon a traditional structure of jurisdictional law and principle defined by state territorial limitations, when the innovative federal concepts and the traditional legal structures simply do not mesh.

For these reasons, it appears logical to conclude that federal rule 4(f) bulge service of process and its associated standard of amenability question are outside the scope of the *Erie-York* doctrine. Once freed from the bonds of *Erie*, there are no obstacles to a federal diversity court's application of a test of amenability to bulge service of process based solely on the due process limitations on a federal court's exercise of in personam jurisdiction and on the 100-mile constraints found in the grant of extraterritorial authority.

IX. CONCLUSION

A standard of amenability to federal rule 4(f) bulge service of process based solely on the due process constraints of the fifth amendment and the 100-mile limitation imposed by rule 4(f) in its grant of extraterritorial authority, similar to that developed by *Sprow*, is clearly preferable to the various state law tests previously applied because a federal standard more effectively affords realization of the policies underlying rule 4(f). Neither considerations of constitutional due process nor any provision of the Federal Rules of Civil Procedure prevent application of such a federal test. Indeed, a federal standard of amenability appears to follow from the Constitution and the federal rules.

Moreover, the *Erie-York* doctrine does not bar a federal test of amenability to bulge process. Even if the twilight zone issue is considered substantive for the purposes of *Erie-York*, it appears that both a *Hanna* and *Byrd* exception to *Erie* exist and permit a federal test. The best reasoned course, however, is a finding that the issue of the appropriate standard of amenability to bulge process is outside the contemplation of the *Erie-York* doctrine. As a result, there is nothing to prevent amenability to bulge service of process from being tested by a federal standard.

Steven W. Tigges